TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~758~~ ~~456~~ 191

HENRY MOYER AND BETSEY MOYER, IMPLEADED WITH CLINTON ELDREDGE, PLAINTIFFS IN ERROR,

vs.

JAMES E. DEWEY AND THREE OTHERS, DEFENDANTS IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

FILED SEPTEMBER 9, 1878.

SUPREME COURT OF THE UNITED STATES.

No. 756.

HENRY MOYER ET AL., PLAINTIFFS IN ERROR,

vs.

JAMES E. DEWEY ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE NEW YORK COURT OF APPEALS.

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STATE OF NEW YORK, SUPREME COURT. } County of Schoharie.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS,

against

CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER.

} Summons for Relief.

To the above named defendants:

You are hereby summoned and required to answer the complaint of the plaintiffs in this action, which will be filed with the clerk of said county, is herewith served upon you, and to serve a copy of your answer on me at Fort Plain, N. Y., within twenty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer said complaint as hereby required, the plaintiffs will apply to the court for relief demanded in the complaint.

Dated May 14th, 1872.

J. E. DEWEY,
Plaintiffs' Attorney.

Affidavits annexed of service of summons and complaint on the defendants Moyers on the 16th, and on Clinton Eldredge on the 31st day of May, 1872, and of plaintiffs' attorney of no service of answer or demurrer by defendant Eldredge.

SUPREME COURT—Schoharie County.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS,

against

CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER.

} Complaint.

The plaintiffs complain of the defendants and allege:

That the plaintiffs respectively are and have long been creditors, having judgments against the defendant Clinton Eldredge, who, at the time and times hereafter mentioned, resided and still resides in the town of Sharon, in the said county of Schoharie, and that their said judgments were duly recovered in this court, entered, the rolls filed, the judgments docketed, executions thereon issued to the sheriff of said county, and returned by him wholly unsatisfied to the clerk with whom the roll was filed, for the amounts, and at the times respectively, as follows, viz.:

1. James E. Dewey against Clinton Eldredge. Roll filed and judgment entered and docketed in Otsego county July 5, 1858, and docketed in Schoharie county July 8, 1858, for

debt and costs, $119.68. Execution received by the sheriff April 28, 1863, and returned and filed May 7, 1863. Second execution received by the sheriff September 26, 1864, and returned and filed November 25, 1864. Third execution received by the sheriff October 18, 1866, and returned and filed November 2, 1866.

2. James Reid against Clinton Eldredge. Roll filed and judgment entered and docketed in Schoharie county February 9, 1859, for debt and costs, $93.16. Execution received by sheriff April 28, 1863, and returned and filed May 7, 1863. Second execution received by sheriff September 26, 1864. and returned and filed November 25, 1864.

3. Ephraim Dockstader against Clinton Eldredge. Roll filed and judgment entered and docketed in Schoharie county October 6, 1863, for debt and costs, $225.68. Execution received by sheriff October 6, 1863, and returned and filed October 6, 1863. Second execution received by sheriff September 26, 1864, and returned and filed November 25, 1864.

4. James E. Dewey against Clinton Eldredge. Judgment on first above judgment. Roll filed and judgment entered and docketed in Schoharie county June 27, 1870, for debt and costs, $227.10. Execution received by sheriff October 4, 1870, and returned and filed October 18, 1870.

5. James Reid against Clinton Eldredge. Judgment on second above judgment. Roll filed and judgment entered and docketed in Schoharie county June 27, 1870, for debt and costs, $174.42. Execution received by sheriff October 4, 1870, and returned and filed October 18, 1870.

6. Ephraim Dockstader against Clinton Eldredge. Judgment on third above judgment. Roll filed and judgment entered and docketed in Schoharie county, June 27, 1870, for debt and costs, $338.85. Execution received by sheriff October 4. 1870, and returned and filed October 18, 1870.

7. George S. Tuckerman, as receiver of the New York Central Insurance Company, against Clinton Eldredge. On verdict rendered July 1, 1858. Roll filed and judgment entered and docketed in Otsego county August 2, 1870, for debt and costs, $1,849.47; docketed in Schoharie county August 5, 1870, and assigned to James E. Dewey August , 1870.

8. James E. Dewey against Clinton Eldredge. Judgment on last above judgment. Roll filed and judgment entered and docketed in Schoharie county September 30, 1870, for debt and costs, $1,876.94. Execution received by sheriff October 4, 1870, and returned and filed October 18, 1870.

9. Alonzo B. Coons against Clinton Eldredge. Roll filed and judgment entered and docketed in Schoharie county, October 3, 1870, for debt and costs, $739.47. Execution re-

ceived by sheriff October 4, 1870, and returned and filed October 18, 1870.

That said judgments were duly given and rendered by this court, in actions commenced upon demands which accrued against the said Eldredge as follows, viz.:

No. 1. On a demand, which accrued for services and disbursements, in 1856.

No. 2 On a promissory note, dated May 22d, 1858, for a demand which accrued in February, 1858.

No. 3. On a promissory note, dated January 8th, 1858, for a demand which accrued in 1853.

Nos. 4, 5 and 6, on the judgments, numbers one, two and three, for demands which accrued respectively, as above stated, including interest and costs.

No. 7. On a promissory note, made in 1851 or 1852, and action commenced in December, 1857, which was defended, and verdict rendered at the Circuit, for the plaintiff therein, July 1, 1858.

No. 8. On the judgment number seven, which accrued as last above stated, the same having been sold, transferred and assigned to the plaintiff in number eight, including interest and costs.

No. 9. On divers promissory notes and demands which had been sold, transferred and assigned to the plaintiff therein, and which had respectively accrued in the years 1856, 1857 and 1858, and some in later years, the largest portion thereof having accrued before June, 1858.

That each of said executions was subscribed by the attorney for the plaintiff therein, and directed to the said sheriff, and each of them referred to and recited the judgment on which it was issued, stating the court, the names of the parties, the county where the judgment-roll was filed, the time of docketing in said county of Schoharie, the amount of the judgment, and the whole amount thereof, as actually due thereon, and required him to satisfy the judgment out of the property of said Eldredge, and if sufficient could not be found, then out of the real property belonging to him on the day the judgment was docketed in that county, or at any time thereafter, and to return the same within sixty days after its receipt by him to the clerk with whom the roll was filed; and was indorsed with a direction to levy the amount of the judgment, stating its amount, with interest from the rendition thereof, stating the time, and to return the same as aforesaid; and such sheriff, within said sixty days, duly indorsed on each of said executions his return, duly certified, that the said Eldredge had no goods or chattels, lands or tenements whereof he could make the amount of such execution or any part

thereof, and duly returned and filed the same with the clerk of the proper county, as thereby directed.

That each of said judgments remains in full force, not reversed or vacated or in any manner discharged, and no part of either of them, or of the demands on which they were respectively rendered has ever been paid or collected, or in any manner satisfied.

The plaintiffs further show unto this court, that on the 30th of March, 1850, for the consideration of $6,500, by him paid therefor, the defendant Clinton Eldredge became the owner in fee, by conveyance from one Le Ray Eldredge, of a farm situated in said town of Sharon, and containing about one hundred acres of land, subject to a mortgage given thereon by said Le Ray Eldredge, April 2, 1849, to one Elihu Eldredge, for $3,600, on which the interest was paid, and sufficient of the principal to reduce the amount remaining unpaid thereon, on the 2d of April, 1858, to $1,000, or about that sum, and on receiving such conveyance, the said Clinton Eldredge entered into possession of said farm, and continued to occupy and cultivate the same until about April, 1862. That the defendants in this action, as the plaintiffs are informed and believe, caused judgment rolls to be filed and judgments to be entered in the Supreme Court, and docketed in the clerk's office of Schoharie county against said Clinton Eldredge; one in favor of the defendant Henry Moyer, on the 29th day of February, 1856, for $1,551.35, and the other in favor of the defendant Betsey Moyer, on the first day of May, 1858, for $783.84, the same being fictitious, and without consideration, and entered and docketed with the intent, on the part of the defendants, to hinder, delay and defraud the creditors of said Clinton Eldredge, and with the view and for the purpose of placing his property beyond their reach. That one James Parsons, a brother-in-law of the defendant Clinton Eldredge, also recovered three judgments in Justice's Court by confession, against the said Clinton Eldredge, April 9th, and docketed April 15th, 1856, amounting, together, to $555.14, which became liens on said farm.

The plaintiffs further show that in the spring of 1858, the defendant Eldredge was, by reason of his indebtedness, in embarrassed circumstances, the said receiver's suit then pending against him and at issue and to be tried in June following, and by reason thereof, the said Eldredge, and the defendant Betsy Moyer, his sister, and the defendant Henry Moyer, her husband, entered into a scheme or plan to divest the defendant Eldredge of his title to said farm and vest it in the defendants Betsey Moyer and Henry Moyer, or one of them, by or through the means afforded by the said mortgage thereon, so held by Elihu Eldredge, all of which was due and

on which was then unpaid only about $1,000; and with the intent, on the part of these defendants, as the plaintiffs are informed and believe, to hinder, delay and defraud the creditors of the said Clinton Eldredge, and with the view and for the purpose of covering up his property and placing it beyond the reach of his creditors or of their just demands against him, they, the defendants, by their urgent request and solicitation procured the said Elihu Eldredge's consent to foreclose the said mortgage for the balance unpaid thereon, and thereupon proceedings were instituted for that purpose, under the arrangement and understanding between the defendants, secretly made and carried out, that under such foreclosure sale the farm should be bid in by the defendants Moyers, or one of them, or by some one for them, to be held for the benefit of said Clinton Eldredge, who should remain on and work the same in the name of and ostensibly for the holder of the title, but ultimately and in fact for the real benefit of said Clinton, and that he and his family should remain and be supported thereon, and when it was deemed advisable or safe to do so they would restore to him the title to the farm and the proceeds or the amount that either of the said Moyers might receive therefrom, after deducting the amount paid out on such foreclosure. That prior to such sale the said Moyers, or one of them, bought in and took an assignment of the said Parsons judgments.

And the plaintiffs further show that, in pursuance of the arrangement and understanding aforesaid, the farm was advertised to be sold on the 5th day of June, 1858, at the office of the attorney conducting such foreclosure, some ten or twelve miles distant from said farm, the notice of sale being signed by said mortgagee and his attorney, and claiming unpaid on said mortgage only the sum of $1,070 at the date thereof on the 10th day of March, 1858; and on the day of sale one Seth Eldredge, at the request of the said Moyers, and with the understanding and agreement which was then, or soon after, reduced to writing and signed by them, that he should, after a time, convey the said farm to one of them, he being reimbursed, attended said sale and bid off or bought said farm thereon for $4,374.66, which was just the amount of said judgments in favor of the defendants Henry Moyer and Betsey Moyer, and of James Parsons and the mortgage, together with the interest on them and the costs of foreclosure.

That said farm was then of the value of about $7,500. And afterward, on the 16th of November, 1858, the said Seth Eldredge conveyed the same by deed, expressing the consideration of $4,500, to the defendant Betsey Moyer, in pursuance of said agreement under which he bid off the same, but that no part of said bid was ever, in any manner, paid out by either of said

Moyers or by said Seth Eldredge, except the balance so unpaid on said mortgage and the costs of such foreclosure.

That afterward the defendants Betsey Moyer and Henry Moyer sold and conveyed, on the 26th of January, 1859, to the said Elihu Eldredge, twenty acres out of said farm, for which he paid to them, or one of them..... $1,000 00

And on the 25th of February, 1859, to one Peter A. Ham, or Mathew Ottman, about forty or forty-five acres out of said farm, for which he paid to them, or one of them..... $2,200 00

And retained forty-four acres thereof, on which the buildings and hop-yards were situated, until the 2d day of April, 1862, when they sold and conveyed that part thereof to Seward Eldredge, a son of the said Clinton Eldredge, for which he paid them, or one of them..... $4,000 00

Making in all received by them for said farm..... $7,200 00

That about the time of the last above conveyance, in pursuance of the arrangement and understanding between these defendants as aforesaid, under which said foreclosure proceedings were instituted, they procured a farm of about one hundred and eleven acres of land lying in said town of Sharon and near to the farm which is first above mentioned, to be conveyed to the defendant Betsey Moyer, by deed executed by William L. Lane and wife, and Magdalene Lane, bearing date April 5, 1862, and placed the defendant Clinton Eldredge and his family in the occupation and possession thereof, and from that time to the present he has continued to occupy and cultivate the same and he and his family to be supported thereon, which farm was, when conveyed to said defendant Betsey Moyer, and still is, subject to two mortgages thereon, viz.: one by William Lane, May 1, 1855, for $1,300 and interest, and the other by her said grantors, February 14, 1860, for $700 and interest, both of which she assumed and agreed to pay; and on receiving her said conveyance she gave back her mortgage on said farm to Magdalene Lane, one of her grantors, dated April 5, 1862, for $700 and interest and which has since been assigned to one Leonard Lagrange who still holds the same.

The plaintiffs further show that from the time of said arrangement for said foreclosure until April, 1862, the defendant Clinton Eldredge worked and cultivated the farm first above mentioned, except the portions conveyed out of the same by the said Moyers, from the time they were so conveyed respectively, and then from about the 1st of April, 1862, he worked and cultivated the other or last mentioned farm

until the year 1869, and during all that time, commencing with the season of 1858, he raised, gathered and marketed therefrom valuable crops of grain, hops, hay and vegetables, and raised and sold cattle, horses and other animals all in the name and ostensibly for the benefit of the said Moyers, or one of them, one or both receiving all the proceeds thereof when sold, and from time to time grain and other produce and articles raised, gathered or made on said farms by the said Clinton Eldredge, all of which was retained by one or both of said Moyers as a cover and with the view and for the purpose on the part of these defendants, of protecting the property and effects of the defendant Clinton Eldredge and placing them beyond the reach of his creditors and especially of the claims and demands upon which the plaintiffs' said judgments are founded.

That in so cultivating and managing said farms the said Clinton Eldredge received and gathered and sold therefrom, besides other crops, a large amount of hops and the proceeds thereof were received by one or both of the said Moyers, in the years and at the prices and to the amounts respectively as follows, viz.:

1858.	5,000 lbs. at 12½ cents		$625 00
1859.	9,000 lbs., and over, at 12½ cents		1,125 00
1860.	9,431 lbs. at 25 cents		2,357 75
1861.	5,441 lbs. at 15½ cents		843 35
1862.	3,312 lbs. at 19½ cents	$645 84	
	3,269 lbs. at 15½ cents	506 70	
			1,152 54
1863.	4,213 lbs. at 20 cents		842 62
1864.	1,132 lbs. at 20 cents		226 40
1867.	Weight and price not known, amount received		844 00
	Amounting, received for hops alone, to		$8,016 64
	Which, with the amount received for the farm first mentioned, which the Moyers sold in parcels		7,200 00
	Amounts to the sum of		$15,216 64

Besides the interest on such sums from the time when they were respectively received by the said Moyers, all of which they have kept and retained from the creditors of said Clinton Eldredge, and from him also, except the amount unpaid on the mortgage foreclosed, as aforesaid and the costs of foreclosure.

And the plaintiffs further show that in pursuance of the original fraudulent arrangement for the foreclosure of said Elihu Eldredge's mortgage, or in part compliance with the

understanding between the defendants on that subject in the spring of 1858, the said defendants Henry Moyer and Betsey Moyer, on the 11th day of November, 1868, by deed, bearing that date and expressing the consideration of $3,000, conveyed to the defendant Clinton Eldredge the said farm of 111 acres, being the farm last mentioned, and the one the said Clinton Eldredge was then occupying as aforesaid, the said Henry Moyer thereby covenanting to warrant and defend the same against all and every person or persons claiming or to claim the same, or any part thereof, which was recorded in said county, on the 20th of October, 1869; and at the time of receiving such conveyance the said Clinton Eldredge gave back to said Betsey Moyer a mortgage on said farm, purporting to secure to her the payment of three thousand dollars ($3,000) and interest thereon, which was also dated November 11, 1868, and was recorded in said County Clerk's office, July 26, 1869, in book 18 of mortgages, page 201, etc.

The plaintiffs further show, on information and belief, that before and at the time of placing the title to said farm in the name of the defendant Clinton Eldredge, as aforesaid, it was agreed and understood between these defendants secretly that he should give back a mortgage thereon for said sum of three thousand dollars, an amount sufficient to cover the value thereof, over and above the said mortgages already thereon, viz., one for $1,300 and two for $700 each, besides the interest, for the purpose and with the view of covering up and protecting the same, and placing it beyond the reach of said Clinton's creditors and of their just claims, but that the said Clinton Eldredge would not be required to pay the same, and that such mortgage should not be enforced against him or the farm, or for any purpose, except for the purpose of keeping off his creditors; and it was further agreed and understood secretly between them that the said Moyers, one or both of them, should and would pay off and take assignments, and hold for the same purpose the said prior mortgages thereon, amounting, besides interest, to $2,700, but would not enforce either of them against the farm or said Clinton, or for any purpose, except to protect the same from his creditors. And the plaintiffs allege that the said mortgage for three thousand dollars, so executed to the defendant Betsey Moyer, was given and received, with the intent, on the part of these defendants, to hinder and delay and cheat and defraud the creditors of the defendant Clinton Eldredge; and that he, the said Clinton, has property and effects to the amount of over $10,000, as the plaintiffs are informed and believe, held in trust or controlled for him by the said Moyers under and by reason of the fraudulent transactions aforesaid, and that the plaintiffs and the creditors of said Clinton Eldredge who have

assigned their claims to the plaintiffs, did not, nor did either of them, discover the facts constituting the fraud or the fraudulent transactions hereinbefore stated, until within two years before the commencement of this action :

Wherefore the plaintiffs ask that the said judgments in favor of the said Henry Moyer and Betsey Moyer respectively, and the said mortgage to said Betsey Moyer for three thousand dollars, be adjudged fraudulent and void, and decreed to be canceled and set aside as against the plaintiffs and their claims and judgments, and that it be adjudged that the said Clinton Eldredge has property and effects held by the said Moyers, one or both of them, in trust for his creditors, and that they account for the same, with lawful interest thereon, and that they be adjudged, decreed, and directed to apply the same, or sufficient thereof, to the payment of the plaintiffs' said judgments, or for such other or further relief, or both, as may be just and equitable, with the costs of this action.

J. E. DEWEY,
Plaintiffs' Attorney.

MONTGOMRY COUNTY *ss.* :

James E. Dewey, of Fort Plain, said county, one of the plaintiffs, being duly sworn, says that the foregoing complaint is true to the knowledge of deponent, except as to those matters stated on information and belief, and as to those matters he believes it to be true ; that deponent has personally examined the records, and investigated the facts of the case, and is better acquainted therewith than is either of the other plaintiffs, and neither of them resides in the county wherein deponent resides.

J. E. DEWEY.

Sworn before me, May 14, 1872.

A. MURRAY, *Justice of the Peace.*

SUPREME COURT.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Plffs.,
against
CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER, Defendants.

Answer of Betsey Moyer.

1. The defendant Betsey Moyer, for herself, in answer to the plaintiffs' complaint in this action, says that she has no knowledge or information sufficient to form a belief as to whether or not said plaintiffs, or either of them, have duly recovered judgments in this court against the defendant Clin-

ton Eldredge, that have been docketed in Schoharie county clerk's office, or the rolls thereof filed, or executions issued thereon to the sheriff of Schoharie county, which have been returned wholly unsatisfied, nor as to any of the allegations in said complaint down to and including the first paragraph in folio 14 (except as to the allegation in folio 1, of the residence of defendant Clinton Eldredge), and therefore denies the same.

2. Said defendant further answering said complaint, denies each and every allegation and averment in folios 16 and 17 of said complaint, charging and alleging that the judgment by her recovered May 1st, 1858, for $783.84 against the defendant Clinton Eldredge as being fictitious and without consideration, and entered and docketed with the intent on her part to hinder, delay and defraud the creditors of said Clinton Eldredge, or either of them, or with the view and for the purpose of placing his property beyond their reach, but alleges that the same was recovered upon a valid subsisting claim against said Clinton Eldredge, then existing in favor of this defendant.

3. The said defendant further answering said complaint, denies each and every allegation and averment in folios 18, 19, 20 and 21 of the said complaint, charging and alleging this defendant with having entered into any scheme or plan with the said defendants Clinton Eldredge and Henry Moyer, or either of them, to divest said Eldredge of his title to the farm mentioned therein, and to invest it in the defendants Moyer, or either of them, or procured a foreclosure of the mortgage of the said Elihu Eldredge with the object, purpose and intent, as therein alleged, or that there ever was any secret or other understanding or arrangement made with her knowledge, that such farm should be bid in by her and the defendant Henry Moyer, or either of them, to be held for the benefit of said defendant Eldredge in their name, or in the name of either of them, for the ultimate benefit of said Clinton Eldredge, or his family or heirs, or that they, or either of them, should ever restore to him the title to said farm, or any of the proceeds, or any portion of the avails thereof, after deducting the amount paid on the foreclosure of said mortgage, but alleges that so far as this defendant has any knowledge of said transaction, the same was in all respects fairly and justly made and fully carried out, and was free from any fraudulent intent or purpose.

4. The said defendant, further answering, denies all of the allegations in folios 22 and 23 of said complaint, averring a sale of said farm in pursuance of any such arrangement or understanding as therein alleged, upon such mortgage foreclosure, or that any request was made of Seth Eldredge to become the purchaser on such sale, or that any parol or writ-

ten agreement was ever made with the said Seth Eldredge, or that said farm was of the value stated in said complaint at the time of such sale, but avers that said real estate had been greatly reduced in value by reason of the burning of the buildings thereon, prior to the conveyance of the same to this defendant by the said Seth Eldredge, as alleged in folio 24; and further alleges that she paid a full and fair market price therefor, and the full value thereof.

5. Said defendant, further answering, denies all the allegations in folios 26 and 27, averring that in pursuance of an agreement, arrangement and understanding, made between defendants upon such mortgage foreclosure, they procured a farm to be conveyed to this defendant by one William L. Lane and wife, and placed the defendant Clinton Eldredge and his family in the occupation and possession thereof. And said defendant further denies that she assumed and agreed to pay the mortgages upon said farm at the time she took the conveyance thereof, and avers that she took such conveyance subject to the incumbrances created and existing by reason of the existence of said mortgages, of which she then had full knowledge.

6. And the said defendant, further answering for herself, denies, and upon her information and belief, so far as relates to the defendant Henry Moyer, denies that they, or either of them, from the time of said mortgage foreclosure until the year 1862, they or either of them received all the proceeds of grain, hops, hay and vegetables raised and sold, and cattle, horses and other animals raised and sold, by defendant Eldredge upon the farms mentioned, and as alleged in folios 29 and 30 of said complaint, or that any of the proceeds received by them, or either of the defendants Moyer, was received or retained by them or either of them as a cover and with the view, or for the purpose on their part, or of either of them, of protecting the same, or the property of the defendant Clinton Eldredge, and placing the same beyond the reach of his creditors or any of them, or the alleged claims upon which the said plaintiffs' alleged judgments are founded, if any such claims or judgments ever existed, which, upon the information and belief of this defendant, are denied. The said defendant, in answer to said allegations, avers that she and the defendant Henry Moyer stocked the said farm, and expended large sums of money for the management and improvement thereof, a large proportion of which was sold, and the proceeds retained by the said Clinton Eldredge, or used for his sole benefit.

7. And the said defendant, further answering, denies that any portion of the avails or proceeds of said farms, or of the cattle, horses or other animals thereon, in and to which the

defendant Clinton Eldredge had any interest whatever, has been by her, or to her knowledge by any other person, kept, retained or detained from the creditors of said Clinton Eldredge, or from him, as stated in folio 33 of said complaint.

8. And the said defendant, further answering said complaint, denies the allegation in folios 33 and 34 thereof, that in pursuance of an original fraudulent arrangement for the foreclosure of the said Elihu Eldredge mortgage, or of any other such agreement or arrangement, or that in compliance or part compliance of an understanding with or between the defendants on that subject in the spring of 1858, the defendants Henry Moyer and this defendant, on the 11th day of November, 1868, by deed conveyed to said Clinton Eldredge the farm therein described, and took the mortgage therein mentioned. But the said defendant avers that upon an actual *bona fide* sale of said farm to said Clinton Eldredge, a deed thereof was duly made, executed and delivered to him, and a mortgage to secure the purchase-price thereof was by him executed to this defendant for the amount specified in said complaint, and was duly recorded, as alleged in folio 35.

9. And the said defendant, further answering said complaint, denies each and every allegation commencing with the first paragraph in folio 36 and all of folios 37, 38 and 39, except as to the allegation in folio 39, that said Clinton Eldredge has property and effects to the amount of over $10,000, which, or any part of which, she denies is held in trust or controlled by her, or by the defendants Moyers for him; and upon her information and belief she denies that the same, or any part thereof, is held in trust or controlled for him by the defendant Henry Moyer.

10. And the said defendant, upon her information and belief, alleges that said plaintiffs, and each of them, and each of the creditors of said Clinton Eldredge who have assigned their claims to said plaintiffs, or either of them, previous to such assignment, and for a period exceeding two years before the commencement of this action, had full knowledge of all the transactions had between the said defendants Moyer, or either of them, and the said Clinton Eldredge, and all the facts connected therewith and constituting the said pretended fraudulent transactions alleged in the complaint in this action.

11. And the said defendant, upon her information and belief, alleges that on or about the 17th day of August, 1868, at Buffalo, in the State of New York, the United States District Court, held in and for the Northern District of the State of New York, duly made an order and a decree discharging the defendant Clinton Eldredge of and from all his debts, of all of which proceedings in the said court in bankruptcy for such discharge the said plaintiffs and their said assignors, and each

of them, had due notice; that the pretended indebtedness, if any such existed, or ever did accrue, accrued prior to the filing of the petition of the said Clinton Eldredge for his discharge from such debts in the said United States District Court, and prior to the granting of such discharge, and that the said indebtedness, and the said several claims, if any such exist, or ever existed, were such as were provable against the estate of the defendant Clinton Eldredge, in the proceedings in which said discharge was granted, and were not, nor was any part thereof, created in consequence of any defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and he is, therefore, discharged therefrom, and from all liability thereon, and the said plaintiffs are precluded and debarred from enforcing or attempting to enforce the same.

12. And the said defendant, further answering said complaint, upon her information and belief, alleges and avers that the said claims upon which the said pretended judgments, Nos. 4, 5, 6, 7, 8 and 9, as stated in said complaint, are based, were not valid, legal, subsisting claims against the said defendant Clinton Eldredge, at the time the said judgments were obtained and recovered against him, by the said plaintiffs, as alleged in said complaint, if any such there are, by reason of lapse of time, and by reason of his said discharge from all his debts in the said United States District Court, but that the said judgments, if any exist, are fictitious, invalid and fraudulent, and were obtained by a fraudulent collusion, understanding, agreement and promise, made between said plaintiffs, or some of them, or their attorneys, or some of them, and the said defendant Clinton Eldredge, that the same should not be enforced against him, nor should any portion thereof be collected from him, or out of his property or effects, but that the same should be only chargeable or attempted to be collected of and from the defendants Moyers, or either of them, for the joint and mutual benefit of the said plaintiffs and the said defendant Clinton Eldredge. Wherefore, defendant asks that plaintiffs' complaint be dismissed with costs.

CHARLES HOLMES,
Attorney for Defendant Betsey Moyer.

SCHOHARIE COUNTY, *ss.:*

Betsey Moyer, of Cobleskill, in said county, one of the defendants, being duly sworn, says the foregoing complaint is true to the knowledge of deponent, except as to those matters

stated on information and belief, and as to those matters she believes it to be true.

Sworn to before me,
July 6th, 1872.

JOHN VAN SCHAICK,
Notary Public, Schoharie Co., N. Y.

SUPREME COURT—Schoharie County.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS,
against
CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER.

Answer of Henry Moyer.

The defendant Henry Moyer, for himself, in answer to the plaintiffs' complaint in this action, says he has no knowledge or information sufficient to form a belief as to whether the plaintiffs are and have been creditors having judgments against the defendant Clinton Eldredge, that were docketed in Schoharie county clerk's office, rolls filed, and executions issued to the sheriff of Schoharie county, and returned wholly unsatisfied to the clerk with whom the rolls were filed, for the amounts and at the times set forth in the complaint, or at any time.

Second. The said defendant for further answer for himself, says he has no knowledge or information sufficient to form a belief as to any of the allegations set up in said complaint from folio 3 to and including first allegation in folio 14.

Third. The said defendant for himself, for further answer, says he admits that on the 30th day of March, 1850, for the consideration of $6,500, one Le Ray Eldredge conveyed to defendant Clinton Eldredge, a farm situate in the town of Sharon, Schoharie county, containing one hundred acres of land, subject to the payment of a mortgage given thereon by said Le Ray Eldredge to one Elihu Eldredge, for $3,600, April 2d, 1849, and that payments had been made thereon to reduce the principal sum to $1,000, on the 2d day of April, 1858, but as to whether the interest had been paid up to that time, said defendant has no knowledge sufficient to form a belief. Defendant also admits that the said Clinton Eldredge went into possession of the said farm and occupied it up to April, 1862.

Fourth. The said defendant for further answer, admits that on the 29th day of February, 1856, he recovered judgment against the defendant Clinton Eldredge, in the Supreme Court, and caused the roll to be filed and judgment docketed and entered in the Schoharie county clerk's office, for the sum of $1,551 35, but denies that the same was fictitious and without

consideration, but alleges that said judgment was duly given and made upon a valuable, full and sufficient consideration for the full amount, as stated therein.

The defendant also admits the entry and docketing of the other judgments in favor of the defendant Betsey Moyer against Clinton Eldredge, but denies that the same was without consideration, and entered and docketed to hinder, delay or defraud creditors of Clinton Eldredge, and with a view and for the purpose of placing his property beyond the reach of his creditors.

Fifth. The defendant also admits that one James Parsons obtained three several judgments in Justice's Court, against the said Clinton Eldredge, on the 15th day of April, 1852, amounting to the sum of $555.74, which became liens on said farm.

Sixth. The said defendant, for further answer, denies each and every allegation set forth in said complaint commencing at folio 18, and continuing down to folio 24, except as hereinafter stated and set forth.

Sixth. The said defendant denies that in pursuance of a fraudulent or corrupt arrangement or understanding between the defendants at any time they the said defendants to which this defendant was a party, procured a farm to be conveyed to the defendant Betsey Moyer, from any person, and place the defendant Clinton Eldredge and his family in the occupation and possion thereof.

Seventh. The defendant denies that Clinton Eldredge worked the farm last mentioned in the plaintiffs' complaint for the benefit of the said Moyers or either of them, or that they or either of them received all the proceeds or any portion thereof when sold by said Clinton Eldredge as a cover or with a view or for the purpose of protecting the property and effects of the defendant Clinton Eldredge, and placing them beyond the reach of the creditors of the said Clinton Eldredge or any or either of them.

Eighth. The said defendant, for further answer, admits that the farm described in the plaintiffs' complaint as containing one hundred and eleven acres of land was, by defendfendants Henry Moyer and Betsey Moyer, conveyed by deed to Clinton Eldredge on the 11th day of November, 1868, and that the consideration expressed in the deed was three thousand dollars, but deny that it was in pursuance of any fraudulent arrangement or agreement, and alleges that it was a *bona fide* conveyance for a full and valuable consideration; and said defendant denies that it was agreed and understood between the defendants at the time of the conveyance of the above mentioned farm to Clinton Eldredge, or at any other time, that the said Clinton Eldredge should give back a mort-

gage on said farm for the purpose or with the view of covering up or protecting the same, or placing it beyond the reach of the creditors of the said Clinton Eldredge of their just claims, or that the said Clinton Eldredge would not be required to pay the same, or that such mortgage should not be enforced against the said Clinton Eldredge, or that it was agreed or or secretly understood that said Moyers, or either of them, should or would pay off and take assignments of the prior mortgages thereon, and would not enforce either of them against the farm or the said Clinton Eldredge, or to protect the same from the creditors of the said Clinton Eldredge, but alleges the fact to be that the $3,000 mortgage was given by the said Clinton Eldredge to defendant Betsey Moyer for a full and valuable consideration and in good faith.

Ninth. The said defendant, for further answer, denies that the said Clinton Eldredge has property or effects to the amount of $10,000, or any other amount, held in trust for him by the said Moyers, or either of them, by reason of any fraudulent transaction or otherwise.

And the said defendant, upon information and belief, alleges that said plaintiff had full knowledge of all the transactions had between defendants Moyer, or either of them, and the said Clinton Eldredge, relating to the said conveyances, and prior, and, alleged in the complaint, for a period exceeding two years before the commencement of this action.

Tenth. The defendant, for further answer, upon information and belief, alleges that on or about the 17th day of August, 1868, at Buffalo, in the State of New York, the United States District Court in and for the Northern District of the State of New York, duly made a decree discharging the defendant Clinton Eldredge from all his debts, all of which said plaintiff had due notice; that the supposed indebtedness alleged in the complaint, if any such ever did accrue, accrued before the granting of such discharge, and the indebtedness and several claims, if any ever existed, were such as were provable against the estate of the defendant Clinton Eldredge in the proceedings in which said discharge was granted, and were not, nor was any part thereof, created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.

Wherefore the defendant asks that the plaintiffs' complaint be dismissed with costs.

W. H. YOUNG,
Attorney for Defendant Henry Moyer,
Cobleskill, N. Y.

SCHOHARIE COUNTY, *ss.:*

Henry Moyer, defendant, being duly sworn, says that he

has heard read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to the facts set forth on his information and belief, and as to those facts he believes it to be true.

HENRY MOYER.

Sworn to before me,
June 29th, 1872.

JOHN VAN SCHAICK,
Notary Public.

The action and the issues so joinrd therein were, by consent, duly referred to Hon. A. Dallas Wait, as sole referee, to hear and determine the same and report thereon, and were tried before him as such referee in 1874–5.

On the trial, witnesses were examined on both sides of the questions of fact, and oral and written evidence introduced by the respective parties.

After the plaintiffs had rested their case the defendants offered in evidence certain papers, copies of which are hereto annexed, marked Exhibit A.

The plaintiffs objected to the admission of these papers, and to each of them severally:

First. On the ground that such papers were not properly or sufficiently authenticated.

Second. That they were inadmissible under the pleadings, not being set up in either answer either according to statute or in pursuance of the common-law rule.

Third. That the defendants Henry and Betsey Moyer should not be allowed either to plead or interpose a bankruptcy discharge of the other defendant; it is only the debtor who, under the statute, can set it up.

The objection was overruled, and the papers above named were admitted in evidence, and the plaintiffs excepted.

Copies of said papers, with the certificates authenticating the same, are hereto annexed marked A:

EXHIBIT A—No. 1.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE, } *ss.:* No. 447.
Northern District of New York,

I, Millard P. Fillmore, Clerk of said Court, do hereby certify that I have compared the annexed copy of petition and schedules entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said

[L. S.] court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE, *Clerk.*

Petition by Debtor.

To the Hon. NATHAN K. HALL, *Judge of the District Court of the United States for the Northern District of New York:*

The petition of Clinton Eldredge, of the town of Sharon, in the county of Schoharie, and State of New York, and district aforesaid:

Respectfully represents that he has resided, for over six months next immediately preceding the filing of this petition, at Sharon, within said judicial district; that he owes debts exceeding the amount of three hundred dollars, and is unable to pay all of the same in full; that he is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

That the schedule hereto annexed marked A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors—and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed marked B, and verified by your petitioner's oath, contains an accurate inventory of all his estate, both real and personal, assignable under the provisions of said act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt, within the purview of said act; and that he may be decreed to have a certificate of discharge from all his debts provable under the same.

CLINTON ELDREDGE.

YOUNG & HOLMES,
Solicitors for Petitioner,
Cobleskill, N. Y.

UNITED STATES OF AMERICA, }
Northern District of New York, } *ss.:*

I, Clinton Eldredge, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true, according to the best of my knowledge, information and belief; and I do further make oath that I am a citizen of the United States

of America, and that I will bear true faith and allegiance to the same.

CLINTON ELDREDGE,
Petitioner.

Subscribed and sworn to before me, this 4th day of December, A. D. 1867.

A. B. VOORHES,
Register in Bankruptcy.

(Here follow schedules annexed.)

UNITED STATES OF AMERICA, DISTRICT COURT, CLERK'S OFFICE, Northern District of New York, } *ss.:* No. 447.

I. Millard P. Fillmore, clerk of said court, do hereby certiy that I have compared the annexed copy of order of reference, with the original order entered on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] Court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE,
Clerk.

DISTRICT COURT OF THE UNITED STATES, For the Northern District of New York.

In the matter of CLINTON ELDREDGE, a Petitioner for Adjudication in Bankruptcy of Himself. } In Bankruptcy. No. 447.

NORTHERN DISTRICT OF NEW YORK, *ss.:*

Whereas, Clinton Eldredge, of the county of Schoharie, State of New York, and district aforesaid, has, on this 11th day of December, A. D. 1867, at 3 o'clock P. M., filed in the office of the clerk of said court, a petition for adjudication in bankruptcy against himself, according to the provision of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

It is thereupon ordered, on motion of Messrs. Young & Holmes, of counsel for said petitioner, that said petition be referred to A. B. Voorhees, Esq., one of the registers in bankruptcy of this court, to make adjudication thereon, and take such other proceedings therein as are required by said act: and further, that the said petitioner shall, on or before the 14th day of December, 1867, at 9 o'clock A. M., file with said

register a duplicate copy of said petition, and the schedule thereto annexed, and that he attend before said register on said day, at 10 o'clock A. M., and thenceforth, as said register may direct, to submit to such orders as may be made by said register, or by this court, relating to his said bankruptcy. And further, that until otherwise ordered by the court, the said register shall act upon the matters arising in this case, at his office at Albany, in the county of Albany, at the time last aforesaid, and afterward at such times as he shall fix for that purpose.

N. K. HALL.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE,
Northern District of New York, } *ss.:* No. 447.

I, Millard P. Fillmore, clerk of said court, do hereby certify that I have compared the annexed copy of memorandum of first meeting of creditors with the original memorandum entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] said court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE,
Clerk.

DISTRICT COURT OF THE UNITED STATES,
For the Northern District of New York.

At Albany, in the said district, on the 8th day of January, A. D. 1868, before A. B. Voorhees, Register in Bankruptcy.

In the matter of
CLINTON ELDRIDGE,
Bankrupt. } In Bankruptcy. No. 447.

NORTHERN DISTRICT OF NEW YORK, *ss.:*

Memorandum. This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, whereof the notice required in that behalf has been duly given by publication and service by mail, as appears by the messenger's return of the warrant and of his doings thereon: I, the undersigned, register of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take the proof of debts and for the choice of assignees under the said bankruptcy: and I do hereby certify that no creditors appeared, and there being no opposing interest, I appointed David J. Norton, of Albany city, in the county of

Albany, and State of New York, as assignee of the estate of the said bankrupt, and it is hereby ordered that he be, and he hereby is appointed assignee of the said estate accordingly.

A. B. VOORHEES,
Register in Bankruptcy.

I do hereby approve of and confirm the said choice and appointment of assignee.

February 6, 1868. N. K. HALL,
District Judge.

I do hereby certify that the within is a true copy of amemorandum and order this day made by me. Dated this 8th day of January, 1868.

A. B. VOORHEES,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE, } *ss.:* No. 447.
Northern District of New York,

I, Millard P. Fillmore, clerk of said court, do hereby certify that I have compared the annexed copy of a copy of an assignment with the original copy on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE, *Clerk.*

DISTRICT COURT OF THE UNITED STATES,
For the Northern District of New York.

In Bankruptcy. No. 447.

In the Matter of
CLINTON ELDREDGE, Bankrupt.

NORTHERN DISTRICT OF NEW YORK, *ss.:*

Know all men by these presents, that David J. Norton, of the city of Albany, in the county of Albany and State of New York, in said district, has been duly appointed assignee in said matter. Now, therefore, I, Alonzo B. Voorhees, Register in Bankruptcy of said district, by virtue of the authority vested in me by the 14th section of an act of Congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said David J. Norton, assignee, as aforesaid, all the estate, real and personal, of the

said Clinton Eldredge, bankrupt, aforesaid, including all the property, of whatever kind, of which he is possessed, or in which he was interested, or entitled to have, on the 11th day of December, A. D. 1867, with all his deeds, books and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said 14th section of said act.

To have and to hold all the foregoing premises to the said David J. Norton and his heirs forever, in trust nevertheless, for the use and purposes, with the powers, and subject to the conditions and limitations set forth in said act.

In witness whereof, I, the said register, have hereunto set [L. S.] my hand, and caused the seal of said court to be affixed, this 22d day of January, 1868.

A. B. VOORHEES,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE,
Northern District of New York. } *ss.:* No. 447.

I, Millard P. Fillmore, clerk of said court, do hereby certify that I have compared the annexed copy of petition for discharge, and order thereon, with the original petition and order entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE,
Clerk.

IN BANKRUPTCY—No. 447.

In the Matter of CLINTON ELDREDGE,
a Bankrupt.

To the Hon. NATHAN K. HALL, *Judge of the District Court of the United States for the Northern District of New York:*

Clinton Eldredge, of the town of Sharon, in the county of Schoharie, and State of New York, respectfully represents that, on the fourteenth day of December last past, he was duly declared a bankrupt, under the act of Congress in that case made and provided; that he hath duly surrendered all his property and rights of property, and fully complied with and obeyed all the orders and directions of the court touching his bankruptcy, and is ready to submit himself to any other

and further examinations, orders and directions which the court may require; that no creditors of said bankrupt have proved any claims, nor have any assets come to the hands of the assignee herein.

Wherefore, he prays that he may be decreed by the court to have a full discharge from all his debts provable under said bank act, and a certificate thereof granted according to the said act of Congress.

Dated this 25th day of June, A. D. 1868.

CLINTON ELDREDGE,
Bankrupt.

UNITED STATES OF AMERICA,
Northern District of New York. } *ss.:*

I, Clinton Eldredge, the petitioner above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by me, are true, so far as the same are stated of my own knowledge; and that those matters which are stated therein on information and belief are true, according to the best of my knowledge, information and belief.

CLINTON ELDREDGE,
Petitioner.

Subscribed and sworn to before me,
this 25th day of June, A. D. 1868.

A. B. VOORHEES,
Register in Bankruptcy.

NORTHERN DISTRICT OF NEW YORK, *ss.:*

On this 7th day of July, A. D. 1868, on reading the foregoing petition, it is ordered by the court that a hearing be had upon the same on the 17th day of August, A. D. 1868, before said court, at the United States Court-room in Buffalo, in said district, at 10 o'clock A. M.; and that notice thereof be published in two newspapers printed in said district for three times once a week; and that all creditors who have proved their debts, and other persons in interest, may appear at the said time and place, and show cause, if any they have, why the prayer of the said petition should not be granted.

And it is further ordered by the court, that all such creditors whose places of residence are known shall be entitled to a service of notice of the said petition and order, either personally or by letter addressed to them at their known usual place of residence, attested by the clerk of the court, or served at

their usual place of abode by the marshal or his deputy, or sent by mail, whereof due proof shall be given.

And it is further ordered that the publication of such notices shall be made in the newspapers designated by the 32d Rule in Bankruptcy heretofore adopted by this court.

Witness the Honorable Nathan K. Hall, Judge of the said court, and the seal thereof, at Buffalo, in said district, on the 7th day of July, A. D. 1868.

M. P. FILLMORE,
Clerk of District Court for said District.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE, } *ss.:* No 447.
Northern District of New York,

I, Millard P. Fillmore, Clerk of said Court, do hereby certify that I have compared the annexed copy of affidavit of bankrupt before discharge with the original affidavit entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] court to be affixed at the city of Buffalo, in said district, this 23d day of June, A. D. 1874.

M. P. FILLMORE, *Clerk.*

DISTRICT COURT OF THE UNITED STATES,
For the Northern District of New York,

In the Matter of } In Bankruptcy.
CLINTON ELDREDGE, a Bankrupt. } No. 447.

NORTHERN DISTRICT OF NEW YORK, *ss.:*

Clinton Eldredge, the petitioner above named, being duly sworn, deposes and says, that he has not willfully sworn falsely in his affidavit annexed to his petition, schedule or inventory filed in this case, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; that he has not concealed any part of his estate or effects, or any books or writings relating thereto; that he has not been guilty of any fraud or negligence in the care, custody or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of the bankrupt act passed by Congress, approved March 2, 1867, and entitled "An act to establish a uniform system of bankruptcy throughout the United States;" that he has not caused, permitted or suffered any loss, waste, or destruction thereof; that he did not

within four months before the commencement of such proceedings, procure his lands, goods, money or chattels, or any part thereof, to be attached, sequestered or seized on execution; that since the passage of the said act, he has not destoyed, mutilated, altered or falsified any of his books, documents, papers, writings or securities; that he has not made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; that he has not removed or caused to be removed any part of his property from this district with intent to defraud his creditors; that he has not given any fraudulent preference contrary to the provisions of the said act, or made any fraudulent payment, gift, transfer, conveyance or assignment of any part of his property, or lost any part thereof in gaming; that he has not admitted a false or fictitious debt against his estate; that he has not had knowledge that any person has proved a false or fictitious debt against his estate, without having disclosed the same to his assignee within one month after such knowledge; that he has not, whilst being a merchant or tradesman, failed, subsequently to the passage of this act, to keep proper books of account; that he has not, nor has any person in his behalf, procured the assent of any creditor to the discharge, or influenced the action of any creditor, at any stage of the proceedings, by any pecuniary consideration or obligation; that he has not, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who was or might be under liability for him, or for the purpose of preventing the property coming into the hands of the assignee, or of being distributed under said bankrupt act in satisfaction of his debts; that he has not been convicted of any misdemeanor under said act, or been guilty of any fraud whatever contrary to the true intent thereof; and that he has not done, suffered, or been privy to any act, matter or thing specified in the said bankrupt act as a ground for withholding a discharge, or as invalidating a discharge if granted.

CLINTON ELDREDGE,

Subscribed and sworn before me by the above named Clinton Eldredge, at Albany, State of New York, this 15th day of August, 1868.

A. B. VOORHEES,
Register in Bankruptcy.

UNITED STATES OF AMERICA,
DISTRICT COURT, CLERK'S OFFICE,
Northern District of New York, } *ss.:* No 447.

I, Millard P. Fillmore, clerk of said court, do hereby certify that I have compared the annexed copy of a decree and indorsement of filing with the original decree and indorsement, entered and on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have caused the seal of the said [L. S.] court to be affixed at the city of Buffalo, in said district, this 5th day of March, A. D. 1874.

M. P. FILLMORE,
Clerk.

DISTRICT COURT OF THE UNITED STATES,
For the Northern District of New York.

In Bankruptcy. No. 447.

In the matter of
CLINTON ELDREDGE,
a Bankrupt. } At Buffalo, in said district, this 17th day of Aug., 1868.

This case having heretofore, to wit. on the 17th day of August, 1868, come on to be heard upon the petition and application of the said bankrupt for a discharge from all his debts, and upon the order heretofore made thereon, that all creditors who had proved their debts, and all persons in interest, might appear on the day last mentioned, at ten o'clock in the forenoon. and show cause, if any they had, why the prayer of the said petition should not be granted; and it now appearing that notice of such order has been given as required by law and the practice of the court, and that the said bankrupt has in all things conformed to his duty under the act of the Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and is entitled, under the provisions thereof, to receive a discharge.

It is hereby ordered, adjudged and decreed, that this court do and it hereby does adjudge, decree and grant to the said Clinton Eldredge, the said bankrupt, a discharge from all his debts, except as in said act provided.

And it is further ordered, adjudged and decreed, that a certificate of such discharge, under the seal of this court (attested by the clerk thereof), in the words and figures following, viz.:

DISTRICT COURT OF THE UNITED STATES,
For the Northern District of New York.

In Bankruptcy. No. 447.

In the Matter of CLINTON ELDREDGE,
a Bankrupt.

Whereas, Clinton Eldredge, of the town of Sharon, in the county of Schoharie and State of New York, has been duly adjudged a bankrupt, under the act of Congress, establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said Clinton Eldredge be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 11th day of December, 1867, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of the court, at
[L. S.] Buffalo, in the said dis trict, this 17th day of August, A. D. 1868.

N. K. HALL,
Judge.

Attest: M. P. FILLMORE,
Clerk.

Be immediately signed by the judge of this court and given to the said bankrupt, Clinton Eldredge.

And thereupon the certificate of the discharge of the said bankrupt, under the seal of this court, attested as aforesaid, and in the words and figures aforesaid, was duly signed by the said judge, and given to the said bankrupt, on the day and year in the caption in this order and decree above mentioned.

In testimony whereof, and of the proceedings of this matter, on the same day and year, and at the place mentioned in the caption hereof, the record thereof is duly signed by the judge and clerk of the said court.

N. K. HALL,
Judge.

M. P. FILLMORE,
Clerk.

Filed August 18, 1868.

The Referee, after hearing the evidence, made and filed his report in writing as follows, viz. :

SUPREME COURT.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS,
against
CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER.

Referee's Report.

To the Supreme Court of the State of New York:

The undersigned, referee in this action, having heard the proofs and allegations of the parties therein, and duly considered the same, respectfully reports the following

Facts.

First. In March, 1850, the defendant Eldredge became the owner and went into possession of the "Leesville farm," worth six or seven thousand dollars, subject to the Elihu Eldredge mortgage for $3,600, on which, in April, 1857, $1,000 remained unpaid, and said defendant continued, until the sale under that mortgage, on the 5th of June, 1858, to own, and until the 2d day of April, 1862, to reside on and cultivate said farm.

Second. Judgments against said defendant became liens thereon, viz.: one in favor of the defendant Henry Moyer for $1,551.35, February 29, 1856, and three in favor of James Parsons, amounting to $555.14, April 15, 1856.

Third. The said defendant was indebted to the plaintiffs and those under whom they claim respectively, as alleged in the complaint, and they recovered judgments thereon against him, which were entered and docketed, and on which executions were issued and returned wholly unsatisfied by the sheriff, as particularly set forth in the complaint, which judgments remain wholly unsatisfied, and in full force.

Fourth. When the foreclosure proceedings hereinafter mentioned were instituted, the said defendant Clinton Eldredge was under pecuniary embarrassments, and a suit was pending against him upon a note made in 1852 for $800, which suit was commenced in December, 1857, and was to be tried at the next Circuit, late in June, 1858.

Fifth. That for the purpose of bringing about a transfer of the said defendant Eldredge's title to said farm before judgment could be obtained against him in that suit and of placing his interest in said farm beyond the reach of his creditors, the defendant Henry Moyer conceived the project of procuring the foreclosure of said mortgage, and through such foreclosure of obtaining a conveyance to himself and wife, or one of them, of the legal title to said farm.

Sixth. That, with the intent and purpose of obtaining the title thereto in that manner, the defendants Henry Moyer and Betsey his wife induced the defendant Eldredge to allow them to procure, and to aid them in procuring, such foreclosure and conveyance by promising him and his family that they should remain on and cultivate the farm in the name of said Moyers, or of one of them, who would hold the title to the farm and its products, and the proceeds thereof, for the benefit of said Eldredge, and would restore to him the whole thereof, after deducting the liens then existing and the foreclosure costs.

Seventh. With that understanding and purpose, the defendants applied to and procured the consent of the mortgagee to foreclose for that purpose, the Moyers promising him that if he would, they would pay his unsecured demands against defendant Eldredge of about four or five hundred dollars.

Eighth. On the 10th of March, 1858, the foreclosure was commenced under such arrangement, the amount claimed to be unpaid being $1,070, and the sale to be had on the 5th of June, 1858.

Ninth. For the purpose of increasing the apparent liens on the farm and absorbing the surplus, the defendants Moyers induced the defendant Eldredge to confess judgment to Betsey Moyer for $783.84, which became a lien on the 1st of May, 1858, the same being without consideration, and with the intent and purpose of placing his property beyond the reach of his creditors.

Tenth. The three Parsons' judgments above mentioned were, before the foreclosure sale, assigned to and were then owned by the said Moyers, or one of them.

Eleventh. That on the 5th day of June, 1858, one Seth Eldredge (a brother of the defendants Betsey and Clinton), at the request of the Moyers, or one of them, attended said foreclosure sale and bid in the farm, and the same was struck off to him at $4,374.66, which was the amount of the liens then on the farm, including the Betsey Moyer judgment for $783.84, and costs of the foreclosure.

Twelfth. The farm was bid off by the said Seth Eldredge under an arrangement and understanding between him and the defendants that he would, in a short time, convey the same to the Moyers, or one of them, at the same amount; and on the 16th of November, 1858, pursuant thereto he did convey the same to Betsey Moyer by deed expressing the consideration of $4,500, which was about the amount of his bid and interest thereon.

Thirteenth. That, on making said purchase or conveyance, the said Seth Eldredge neither paid out nor received any consideration for either, and neither of the Moyers paid any thing

thereon, except they paid to the mortgagee and his attorney the balance unpaid on the mortgage debt and costs of foreclosure.

Fourteenth. The defendants Henry and Betsey Moyer thereafter sold and conveyed the said "Leesville farm" in parcels and received the consideration therefor, viz.:

January 26th, 1859, to Elihu Eldredge, twenty acres for $1,000.

February 25th, 1859, to Peter A. Ham, forty-four twenty-seven one-hundredth acres for $2,200.

And April 22d, 1862, to Seward Eldredge, forty-four acres, being the residue and on which the buildings and hop-yard were, for $4,000: amounting in all received for the said farm to $7,200.

Fifteenth. At the time of the sale of the said last parcel of that farm the said Moyers, pursuant to the substance of the understanding between these defendants under which they procured such foreclosure, purchased and gave defendant Eldredge possession of the "Lane farm," but the deed was to defendant Betsey and expressed the consideration of $2,200, and was subject to a mortgage dated May 1, 1855, for $1,300, and one dated February 14, 1860, for $700, called the "Lehman mortgages," and said Betsey gave back a mortgage for $700 at the time of receiving her deed on the 5th of April, 1862, from which time the defendant Eldredge occupied that farm and in the name of said Moyers, or one of them, cultivated the same and raised and sold therefrom products thereof until 1869.

Sixteenth. The defendant Eldredge during his occupancy of these farms from June 5th, 1858, to and including 1868, raised, gathered and sold products thereof, in the name and ostensibly for the benefit of said Moyers, or one of them, one or both receiving the proceeds thereof, and, besides other crops, they received from the hops raised by said Eldredge thereon, as set forth in the complaint, the amount at the times following, viz.:

1858.	For 5,000 lbs	$625 00
1859.	For 9,000 lbs	1,125 00
1860.	For 9,431 lbs	2,357 75
1861.	For 5,441 lbs	843 35
1862.	For 3,312 and 3,269 lbs	1,152 54
1863.	For 4,213 lbs	842 62
1864.	For 1,132 lbs	226 40
1867.	Weight unknown; amount received	844 00
	Amounting, for hops, to	$8,016 64
	Which, with the above receipts for the farm	7,200 00
	Amount to	$15,216 64

Seventeenth. That the amount of the liens on the "Leesville farm," at the time of the foreclosure sale thereof, on the 5th day of June, 1858, exclusive of the Betsey Moyer judgment of April 30, 1858, for $783.84, was, including $61 for the statute foreclosure costs, $3,585.60; and, after the receipts above mentioned for the "Leesville farm" and the hops sold therefrom were sufficient to satisfy that amount, with interest, the said Moyers held the residue of said money, as from time to time received, in trust for the benefit of the defendant Eldredge, under the agreement and understanding between them by which the transfer of his title was obtained under said foreclosure that they would hold the same for and restore it to him.

Eighteenth. In part compliance with the said understanding and agreement, the said Moyers, on the 11th day of November, 1868, executed a deed expressing the consideration of $3,000, of said "Lane farm" to the defendant Eldredge, who gave back to defendant Betsey a mortgage thereon for $3,000, and the said farm was then already, and remained, encumbered by the two Lehman mortgages and the one given by Betsey thereon, April 5, 1862, these three mortgages being, for principal, $2,700, and which, with the mortgage of $3,000 given back to Betsey, amounted to more than sufficient to cover the entire value of the farm.

Nineteenth. That before and at the time of the conveyance of the "Lane farm," as aforesaid, to defendant Eldredge, and of the giving back by him of the $3,000 mortgage to Betsey, it was understood and agreed between him and the said Moyers that he would not be required to pay the three prior mortgages or the said $3,000 mortgage, or either of them, or the interest, but that they should be kept on for a time as apparent liens and as a cover to prevent the farm from being reached by his creditors; and pursuant to their understanding as aforesaid, the deed and mortgage of November 11, 1868, were, for the same purpose, not recorded—the deed until the 20th October, 1869, and the mortgage the 26th of July, 1869.

Twentieth. After the foreclosure sale in 1858, and from time to time until and after the deed of November 11, 1868, the defendants Henry and Betsey Moyer promised and assured the defendant Eldredge and his family that they would restore to them his property: that is, the proceeds of the "Leesville farm," and of the products of that and the "Lane farm" in their hands; some of such promises and assurances being to make such restitution when his debts were settled or discharged, or disposed of; and some of them that they would make restitution of his said property when he should be through bankruptcy.

Twenty-first. The said foreclosure was procured, and the

transfer of the title thereunder obtained, the judgment in favor of Betsey Moyer, of April 30, 1858, was confessed, the proceeds of the sale of the "Leesville farm," in parcels, and of the products of both farms from the time of the foreclosure to the deed of November 11, 1868, were received, and have been held, by the Moyers, and the said $3,000 mortgage was given and accepted with the intent, and for the purpose of, defrauding the creditors of the defendant Eldredge, and of which the plaintiffs first had notice or knowledge in the month of June, 1870.

Twenty-second. The plaintiffs' judgments against the defendant Eldredge are in full force and wholly unsatisfied, amounting now to, viz:

Plaintiff Dewey's judgment, of June 27, 1870, for $227.10, to	$306 50
Plaintiff Reid's judgment, of same date, for $174.42, to	235 47
Plaintiff Dockstader's judgment, of same date, for $338.85, to	457 32
Plaintiff Dewey's judgment, of September 30, 1870, for $1,876.94, to	2,499 42
Plaintiff Coon's judgment, of October 3, 1870, for $739.47, to	984 14
Being in all	$4,582 85

Twenty-third. That the defendants Henry and Betsey Moyer have held and still hold, after satisfying their claims and liens above mentioned, the residue of the proceeds of the "Leesville farm," sold in parcels and of the products of that and the "Lane farm" above mentioned, in fraud of the rights of and in trust for the creditors of the defendant Eldredge, to an amount far exceeding the aggregate amount of the plaintiffs' said judgments.

Twenty-fourth. And I further find that on or about the 17th day of August, 1868, at Buffalo, in the State of New York, the United States District Court in and for the northern district of the State of New York, duly made a decree discharging the defendant Eldredge from all his debts, of which said plaintiffs had due notice. That the several judgments first obtained against the said defendants Eldredge, mentioned in the complaint, to wit:

The judgment in favor of James E. Dewey, of July 5th, 1858, for $119.68,

The judgment in favor of James Reid, of February 9th, 1859, for $93.16,

The judgment in favor of Ephraim Dockstader, of October 6th, 1863, for $225.68,

The judgment in favor of George S. Tuckerman, receiver, etc. (upon a verdict rendered July 1st, 1868), for $1,849.47, and the judgment in favor of Alonzo B. Coons, of October 3d, 1870, for $739.47, were each of them for an indebtedness of the said defendant, Clinton Eldredge, which accrued before the granting of such discharge, and the said indebtedness was such as was provable against the estate of the said defendant Eldredge, in the proceedings in which said discharge was granted, and was not nor was any part thereof created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity.

Conclusions of Law.

First. That the defendant Eldredge having waived his discharge in bankruptcy, such discharge is, under the pleadings in this action, unavailable to the other defendants as a defense, and neither it nor the assignment connected therewith, furnishes any bar to the plaintiffs' right of recovery in this action.

Second. That under the pleadings and proofs, the plaintiffs have a perfect right to maintain this action, and are entitled to judgment therein. That the defendants Henry and Betsey Moyer hold in trust for the creditors of the defendant Eldredge sufficient of his property to pay and satisfy the plaintiffs' said judgments, and are liable to them for the amount thereof, and that they apply sufficient of the funds in their hands, so held in trust, to satisfy the same. Also, that the plaintiffs recover of the defendants Henry Moyer and Betsey Moyer the aggregate amount of said judgments in favor of the plaintiffs respectively, being at this date ($4,502.44) four thousand five hundred and two dollars and forty-four cents, together with the costs and disbursements of this action to be adjusted, and judgment is ordered accordingly.

Dated July 24, 1875.

A. D. WAIT, *Referee.*

The defendants filed exceptions thereto as follows:

SUPREME COURT.

JAMES E. DEWEY and others *against* HENRY MOYER and BETSEY MOYER, impleaded with Clinton Eldredge.	Exceptions to Referee's report.

The defendants Henry Moyer and Betsey Moyer hereby except to the report of the referee in the above entitled ac-

tion, dated July 24, 1875, and specify the following as their exceptions thereto:

Among other exceptions so taken are the following, viz.:

Thirty-first. They except to said report because it does not find that the proceedings in bankruptcy and the assignment of the defendant Eldredge and his discharge therein were a bar to the plaintiff's right of recovery.

Thirty third. They except to the said report for that it should be in favor of these defendants and against the plaintiffs.

HALE, HAND, SWARTZ & FAIRCHILD,
Att'ys for Defendant Henry Moyer.

CHARLES HOLMES,
Attorney for Defendant Betsey Moyer.

Judgment for the plaintiffs was rendered and entered upon said report as follows:

SUPREME COURT.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS *against* BETSEY MOYER, HENRY MOYER and CLINTON ELDREDGE.	Judgment, July 27, 1875, at 11 A. M.

This action and the several issues therein having been duly referred by consent of the parties, and order duly entered thereon, to Hon. A. Dallas Wait, as sole referee, to hear and determine the same, and the same having been heard before him, and his report in favor of the plaintiffs having been duly made, dated July 24, 1875:

Now, pursuant thereto, and on motion of J. E. Dewey, the attorney for the plaintiffs, it is by this court adjudged and decreed that the judgment in favor of the defendent Betsey Moyer against the defendant Clinton Eldredge. entered in the clerk's office of Schoharie county on the 1st day of May, 1858, for $783.84, debt and costs, was confessed, and the mortgage for ($3,000) three thousand dollars, bearing date November 11, 1868, executed by the defendant Clinton Eldredge to the defendant Betsey Moyer was given and accepted with the intent and for the purpose of defrauding the creditors of the defendant Clinton Eldredge, and such judgment and mortgage were, and each of them was and is fraudulent and void; that the plaintiffs have a right to maintain this action; that the defendants Henry Moyer and Betsey Moyer hold in trust for the creditors of the defendant

Clinton Eldredge sufficient of his property to pay and satisfy the several judgments in favor of the several plaintiffs mentioned and described in the complaint, and are liable to them for the amount thereof; and they, the defendants Henry and and Betsey Moyer, are hereby required to apply sufficient of the funds in their hands, so held in trust, to satisfy said judgments.

And it is further adjudged and decreed that the plaintiffs recover of the defendants Henry Moyer and Betsy Moyer the aggregate amount of said judgments in favor of the plaintiffs respectively, being at the date of said report four thousand five hundred and two dollars and forty-four cents ($4,502.44), together with the plaintiffs' costs and disbursements in this action to be adjusted or taxed therein, which costs, etc., being adjusted amount to ten hundred and seventy-seven dollars and seventy cents ($1,077.70), and as against the defendant Betsey Moyer this judgment is to be levied and collected of her separate estate; and not otherwise.

THOMAS W. ZEH, JR.,
Clerk.

SUPREME COURT.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Plffs.

against

CLINTON ELDREDGE, BETSEY MOYER and HENRY MOYER, Defts.

GENTLEMEN—Take notice, that the above named defendants, Henry Moyer and Betsey Moyer, appeal to the General Term of the Supreme Court from the judgment of the Supreme Court herein, entered in the clerk's office of the county of Schoharie on the 27th day of July, 1875.

Dated October 6th, 1875.

Yours, etc.,

HAND, HALE, SWVRTZ & FAIRCHILD,
Attorneys for the Defendant Henry Moyer.

And CHARLES HOLMES,
Attorney for the Defendant Betsey Moyer.

To THE CLERK OF THE COUNTY OF SCHOHARIE, and to JAMES E. DEWEY, Esq., Plaintiff's Attorney.

At a General Term of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the City Hall in the city of Albany, on the 19th day of January, A. D. 1877.

Present—Hon. WM. L. LEARNED, *Presiding Justice.*
AUGUSTUS BOCKES,
DOUGLAS BOARDMAN,
Associate Justices.

JAMES E. DEWEY et al.
against
HENRY MOYER et al.

Judgment affirmed with costs. Bockes dissents.
Opinions by Learned, Bockes and Boardman.

(A copy) WM. E. HASWELL, *Clerk.*

SUPREME COURT.

JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Respondents,
against
HENRY MOYER and BETSEY MOYER, Appellants, impleaded with Clinton Eldredge.

Judgment on Appeal, Jan. 23, 1877.

The appeal by the defendants, Henry Moyer and Betsey Moyer, from the judgment entered in this action in favor of the plaintiffs, on the 27th day of July, 1875, having been brought on to argument and heard at a General Term of this court in the third judicial department, and the decision thereon having been duly made and filed, whereby it appears that the said judgment appealed from is affirmed with costs:

Now, on motion of J. E. Dewey, the attorney for the plaintiffs, respondents, it is by this court adjudged, that the said judgment so appealed from, be, and the same hereby is, in all things affirmed, and that the said respondents recover of the said appellants, Henry Moyer and Betsey Moyer, one hundred and sixty-seven dollars and thirty-four cents costs, for defending said appeal, and that as against the appellant Betsey Moyer, the same be levied and collected of her separate estate and not otherwise.

WM. B. MURPHY, *Clerk.*

SUPREME COURT.

JAMES E. DEWEY and others, Plaintiffs,
against
HENRY MOYER, BETSEY MOYER, impleaded, etc., Defendants.

GENTLEMEN—Take notice, that the defendants Henry Moyer and Betsey Moyer appeal to the Court of Appeals from the judgment of the Supreme Court, herein entered in the clerk's office of the county of Schoharie, on the 23d day of January, 1877, and from the whole thereof.

Dated January 30, 1877.

Yours, etc.,
HAND, HALE & SWARTZ,
Attorneys for Defendant Henry Moyer.
And CHARLES HOLMES,
Attorney for the Defendant Betsey Moyer.

TO THE CLERK OF THE COUNTY OF SCHOHARIE, and to JAMES E. DEWEY, Esq., Attorney for the Plaintiffs.

In JANUARY TERM of the COURT OF APPEALS of the STATE OF NEW YORK. On the 15th day of January, 1878, judgment was duly given and rendered in and by said Court of Appeals, whereby the said judgment of the said Supreme Court was in all things affirmed with costs.

The following is the Opinion delivered in the Court of Appeals of the State of New York.

JAMES E. DEWEY, *et al.*, *Respondants*,
vs.
HENRY MOYER, *et al. Impleaded, &c., Appellants.*

S. HAND, *for Appellants.*
J. E. DEWEY, *for Respondents.*

EARL, J. This is an action commenced by four judgment-creditors of the defendant Eldredge, to procure satisfaction of their judgments out of property placed by the debtor in the hands of the other two defendants in fraud of his creditors.

Prior to 1858, Eldredge owned a farm upon which there was a mortgage, and he owed to the plaintiffs, Dewey, Reid and Dockstader, and the assignors of Coons and to other creditors, large sums of money; and then a scheme was concocted and carried into effect, by and between the defendants, the particulars of which are set forth in the complaint, and the report of the referee, to procure the transfer of the said farm to the

defendants Moyer, who were to permit Eldredge to remain on the farm, and cultivate the same in their names, and they were to hold the title to the farm and its products and the proceeds thereof, for the benefit of Eldredge, and to restore to him the whole thereof, after deducting the liens then existing upon the farm, and the costs of the foreclosure of the mortgage; and the referee found that the property was placed in the hands of the defendants Moyer, and accepted by them, with the intent and for the purpose of defrauding the creditors of Eldredge, and that the plaintiff first had notice of the fraud in the month of June, 1870; and he found, also, that the property thus fraudulently placed in the hands of the defendants Moyer was more than sufficient to satisfy the claims of all the plaintiffs. The referee also found that in August, 1868, the United States District Court at Buffalo duly made a decree, discharging the defendant Eldredge from all his debts, and that the judgments mentioned in the complaint were all for debts due plaintiffs which accrued before the said discharge in bankruptcy.

The defendant Eldredge did not answer the complaint, but the defendants Moyer did answer, admitting and denying certain allegations of the complaint, and alleging as the only affirmative defense the discharge of Eldredge in bankruptcy; and the most important question to be determined here is whether such discharge is a defense to this action.

It may be assumed, without deciding it, that the discharge upon the authority of the case of *The Ocean National Bank* v. *Olcott* (46 N. Y. 12), would have furnished a defense to this action, but for the facts now to be noticed. Before the commencement of this action in 1870, the defendant Eldredge confessed judgments to the plaintiffs upon all the debts now represented by the plaintiffs, which existed at the time of his discharge, and upon these judgments executions were issued and returned unsatisfied. The old debts from which Eldredge had been discharged were sufficient considerations for the new judgments confessed. These judgments did not revive Eldredge's liability upon the old debts; but he became a debtor upon the new judgments, and plaintiffs' remedies were confined to them. (*Depuy* v. *Swart*, 3 Wend. 135; *Stearns* v. *Tappin*, 5 Duer, 294, 299; *Lynbuy* v. *Weightman*, 5 Esp. 198; *Carson* v. *Osborn*, 10 B. Mon. 155; *Rice* v. *Maxwell*, 12 Sm and Marsh [Miss.], 280.)

These debts, therefore, being subsequent to the discharge in bankruptcy, were not affected thereby. If, instead of confessing judgment, Eldredge had promised to pay the discharged debts, his discharge would have been no defense to an action to enforce such promise.

It matters not that these debts occurred long subsequent to

the fraudulent disposition of the property. The property was placed in the hands of the defendants Moyer in trust for the future benefit of Eldredge. The agreement was that it was to be restored to him so soon as he should in bankruptcy or otherwise, be discharged from his debts, and by the express language of the statute such an arrangement is void both as to existing and subsequent creditors. (1 R. S. 136, sec. 1). But the referee found that the arrangement as to the property was fraudulent, and that the Moyers as well as Eldredge were concerned in the fraud, and hence the transfers were void, both as to existing and subsequent creditors, and the Moyers became trustees *ex malificio* for both classes of creditors. (King vs. Wilcox, 11 Paige, 589; Savage vs. Murphy, 8 Bosw. 75; S. C. 34 N. Y. 508; Case vs. Phillips, 39 N. Y. 164; Mead vs. Gregg, 12 Barb. 653; Partridge vs. Stokes, 44 How. Pr. 381; Day vs. Cooley, 118 Mass. 524.) *Judge Story*, in Story's Eq. Jur. sec. 361, says that "When the "conveyance is intentionally made to defraud creditors, it "seems perfectly reasonable that it should be held void as to "all subsequent as well as to all prior creditors, on account of "ill faith." In King vs. Wilcox, the Chancellor said: "Upon a "full examination of all the cases, the legal principal appears "to be established that when a voluntary conveyance is made "and received with an actual intent to defraud the then exist-"ing creditors of the grantor, it is not a *bona fide* conveyance "which can protect the grantee against the claims of subse-"quent creditors." In Day vs. Cooly, Morton *J.* said: "It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors."

The Moyers still have the property fraudulently placed in their hands, and they must therefore account for it to the plaintiffs, unless there is good foundation for the further claim made in their behalf, which must now be considered. An assignee in bankruptcy of Eldredge's estate was appointed in 1868, and all his estate was assigned to him, and thereupon the assignee became, under section 14 of the Bankrupt Law of 1867, vested with "all the property conveyed by the bankrupt in fraud of his creditors." Therefore, the property sought to be reached by the plaintiffs in this action, became vested in such assignee, as trustee for the plaintiffs, and the other creditors, if any, of the bankrupt. But this defense was not set up in the answer. It was not mentioned or alluded to therein. But as the discharge was set up, and as the appointment of an assignee must always precede the discharge, it is said that the assignment is necessarily implied and alleged. It may be that the necessary inference from the answer as to the discharge is, that an assignee had been ap-

pointed. The fault with the answer, however, is that this matter is not set up as a defense. There is no notice that the defendants intended to use it as a defense. The court might take notice that the fact existed, but it could not fail also to notice that the defendants did not rely upon it for defense. And, so far as we can perceive, this defense was not mentioned at the trial. The certificate of discharge is in section 34 of the Bankrupt Act, made "conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge," but it is not conclusive evideuce in favor of other parties who seek to use it. Hence the defendants Moyer, in order to prove their defense of the discharge of Eldredge, introduced in evidence all the proceedings in bankruptcy from the filing of the petition to the discharge. The plaintiffs objected to them that they were inadmissible under the pleadings, but they were received. Among the papers thus introduced were the appointment of an assignee, and the assignment to him. We must infer that these proceedings were introduced and received simply to prove the defense of discharge. They were competent upon that defense, and it would be a trap upon the plaintiffs at any time after the close of the trial to allow them to be used for any other purpose. To show still further that this defense was not relied upon at the trial, the referee did not find, as a fact, that there was any assignment, and he was not requested to find it.

The fact, of the discharge implying as it does that there must have been an assignment, does not necessarily show that the plaintiffs had no cause of action. The creditors did not, upon the appointment of an assignee, cease to be interested in the property fraudulently transferred. The assignee became entitled to take it simply as a trustee for them. He did not become a trustee in any sense for the bankrupt, because he had no interest in the property. He had, by his voluntary transfers, which were void only as to creditors, placed it beyond his control. The creditors being all paid or satisfied, the assignee could not reclaim this property for the benefit of the bankrupt. As to him the law would leave it where he had fraudulently placed it. Hence the real parties in interest were the creditors. If the assignee should refuse or neglect to sue for and reclaim property fraudulently transferred, it is abundantly established that the creditors may commence an action to reach the property, making the assignee the debtor and his transferees parties defendant; and in such an action the property will be administered directly for the benefit of the creditors. (Sands v. Codwise, 2 Johns. R. 487; Freeman v. Deming, 3 Sand. Ch. R. 327; Seaman v. Houghton, 3 Barb. Ch. 344; Fort Stanwix Bank v. Leggett, 51 N. Y. 552; Card v. Wallbridge, 18 Ohio, 411;

Phelps v. Curtis, 80 Ill. 109. Franklyne v. Fern, Barnardiston, 30; Nat'l Bank v. Cooper, 9 N. B. R. 529, in U. S. Sup. Court; Boom v. Hall, 7 Bush, 66.)

If the defence had been made in the answer, or at the trial, that there was an assignment, and that the assignee ought to have been made a party, the plaintiffs could have brought him in or they might have shown that he had been discharged and thus divested of his trust, or that they in fact represented all the debts which the bankrupt owed at the time the assignee was appointed; in which event, they being the only parties interested, the absence of a merely formal party would have been disregarded by the court. The Bankrupt Law, section 2, prescribes a limitation of two years for the commencement of an action by an assignee against any person claiming an adverse interest in the property assigned. Here four years had elapsed before this action was commenced, and the plaintiffs might have shown, if this defense had been insisted on, that although the assignee knew of the fraud, more than two years had elapsed, and he had thus lost the right to sue the Moyers for the property claimed by them. In such case their trustee having, by collusion or neglect, lost his right to sue, they certainly would have the right, in their own names, to commence this action. There is, therefore, abundant reason for holding that this defense ought to have been set up in the answer, that the plaintiff could have had an opportunity to meet it. The point made as to this defense is entitled to less favor than it might otherwise receive, because the plaintiffs do in fact represent all the debts mentioned in the schedule attached to the petition in bankruptcy, except four small debts, amounting in the aggregate to less than $200; and, according to the finding of the referee, there will be ample property left in the hands of the Moyers to pay these, if not barred or satisfied in some way. We are, therefore, of opinion that the proceedings in bankruptcy, as they appear in this case, were not a bar to this action.

The claim is also made that plaintiffs Dewey and Coons were practicing attorneys, and that they bought certain of the claims upon which this action is based, for prosecution, in violation of the statute. It is a sufficient answer to this claim that such a defense is not set up in the answer.

It was not error to allow the plaintiffs to prove declarations of the debtor Eldredge, made in the absence of the Moyers, bearing upon the question of fraud in the disposition of his property. It had been proved that he and the Moyers had joined together in a conspiracy to defraud his creditors; and in such a case the acts and declarations of either, made in the execution of the common purpose, and in aid of its fulfillment, are competent evidence against any

of the parties. (Cuyler v. McCartney, 40 N. Y. 221; Newlin v. Lyon, 49 N. Y. 661.) I have carefully examined the other exceptions to which our attention has been called, and it is sufficient to say of them that they were not well taken.

I have not deemed it important to discuss here the facts of this case. The plaintiffs had some difficulties to overcome. There are singular and somewhat extraordinary features in the evidence upon both sides. But it cannot be said that there was not sufficient evidence to authorize the findings of the referee, and hence we cannot interfere with them.

It follows from these views that the judgment must be affirmed with costs.

All concur.

Judgment affirmed with costs.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the State of New York, Greeting:

Because in the record and proceedings and also in the rendition of a plea which is in the said Court of Appeals before you or some of you, being the highest Court of law or equity of the said State of New York in which a decision could be had in the said suit, between James E. Dewey, James Reid, Ephraim Dockstader and Alonzo B. Coons, respondents, and Henry Moyer and Betsey Moyer, impleaded with another, appellants, wherein was drawn in question the construction of a statute of the United States, and a title, right, privilege or immunity was claimed under such statute, and the decision was against the title, right, privilege or immunity specially set up or claimed under such statute of the United States, a manifest error hath happened, to the great damage of the said Henry Moyer and Betsey Moyer, as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with the writ, so that you may have the same at Washington on the 2d Monday of October next, in the said Supreme Court, to be then and there held, that the record of proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MORRISON R. WAITE, Chief Justice of the said Supreme Court, the twenty-ninth day [L. S.] of January, in the year of our Lord one thousand eight hundred and seventy-eight.

(Signed) CHARLES MASON,
Clerk of the Circuit Court of the United States for the Northern District of New York.

(Endorsed) "Writ of Error.
M. HALE, *Attorney for Pl'ffs in Error.*
Allowed Janury 25, 1878
S. E. CHURCH, *Ch J. Court of Appeals.*
Filed Feb. 6, 1878."

SUPREME COURT OF THE UNITED STATES.

HENRY MOYER and BETSEY MOYER, impleaded with Clinton Eldredge,
vs.
JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS.
} *In Error*

Know all men by these presents, that we, Henry Moyer and Betsey Moyer of the city of Albany, county of Albany, and State of New York, Seth Eldredge, of the town of Sharon, county of Schoharie and State aforesaid, and John J. Eldredge, of the city of Albany and State aforesaid,

Are held and firmly bound unto the above named James E. Dewey, James Reid, Ephraim Dockstader, and Alonzo B. Coons, in the sum of Twelve Thousand Dollars, to be paid to the said Dewey, Reid, Dockstader and Coons, their and each of their executors and administrators. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals, and dated this 25th day of January, A. D. 1878.

Whereas the above named Henry Moyer and Betsey Moyer have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled action by the Court of Appeals of the State of New York, affirming a judgment of the Supreme Court of the State of New York, rendered on the 23d day of January, 1877, affirming another judgment of the Supreme Court rendered on the 27th day of July, 1875, in favor of the above named Dewey, Reid, Dockstader and Coons, against the said Henry Moyer and Betsey Moyer, for the sum of five thousand five hundred and eighty 12-100 dollars ($5,580.12), and for one hundred and sixty-seven 34-100 dollars ($167.34) costs of appeal.

Now, therefore, the condition of this obligation is such that if the above named Henry Moyer and Betsey Moyer shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation to be void, otherwise the same shall be and remain in full force and virtue.

HENRY MOYER, [L. S]
BETSEY MOYER, [L. S.]
SETH ELDREDGE, [L. S.]
JOHN J. ELDEDGE, [L. S.]

Sealed and delivered in presence of

LOUIS HAENDEL.

STATE OF NEW YORK,
City and County of Albany, *ss.:*

On this twenty-fifth day of January, A. D. 1878, personally appeared before me Henry Moyer, Betsey Moyer, Seth Eldredge, and John J. Eldredge, to me known to be the individuals described, and who executed the foregoing instrument and severally acknowledged that they executed the same for the purposes therein mentioned.

LOUIS HAENDEL,
Notary Public,
Albany County.

CITY AND COUNTY OF ALBANY, *ss.:*

Seth Eldredge and Betsey Moyer being severally duly sworn, each for himself says that he is a resident and freeholder in the State of New York, and is worth the sum of Twelve Thousand Dollars, over and above all debts and liabilities which he owes or has incurred, and besides property exempt by law from execution.

SETH ELDREDGE,
BETSEY MOYER.

Severally subscribed and sworn to before me, this 25th day of January, A. D. 1878.

LOUIS HAENDLE,
Notary Public,
Albany County.

(Endorsed.) "Bond.

Approved January 25, 1878.
S. E. CHURCH, *Ch. J. Court of Appeals.*
Filed Feb. 6, 1878."

UNITED STATES OF AMERICA, *ss.:*

To JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2d Monday of October next pursuant to a writ of error filed in the office of the clerk of the Court of Appeals of the State of New York, wherein Henry Moyer and Betsey Moyer are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Sanford E. Church, Chief Judge of the Court of Appeals of the State of New York, this 29th day of January in the year of our Lord one thousand eight hundred and seventy-eight.

S. E. CHURCH,
Chief Judge of the Court of Appeals.

(Endorsed). "Citation.
M. HALE, *Attorney for Plaintiffs in error*
To JAMES E. DEWEY, Esq , Deft. in person and
Attorney for Defendants in error."

SUPREME COURT OF THE UNITED STATES.

HENRY MOYER and BETSEY MOYER, impleaded with another Plaintiffs in error,
vs.
JAMES E. DEWEY, JAMES REID, EPHRAIM DOCKSTADER and ALONZO B. COONS, Defendants in error.
} Assignment of error.

Of October Term, in the year of our Lord one thousand eight hundred and seventy-eight.

Afterwards, to wit, on the first Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the capitol in the city of Washington, come the said Henry Moyer and Betsey Moyer, by Matthew Hale, their attorney, and say that in the record and proceedings aforesaid, and also in giving judgment there is manifest error in this, to wit., that by the record aforesaid it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs in error and against the said defendants in error,

and there is also error in this, to wit, that the said plaintiffs in error claimed that they were entitled in the Court of Appeals of the State of New York to a reversal of the judgment of the Supreme Court of the State of New York on the ground that the said judgments, on which the action was based, were not valid, legal, subsisting claims against the said Clinton Eldredge for the reason that the said Clinton Eldredge had been discharged from the same in the United States District Court by a decree in bankruptcy, made in the United States Court held in and for the Northern District of the State of New York, on or about the 17th day of August, 1868, and that the said defendants in error were, by reason of such proceedings and discharge in bankruptcy, the assignment connected therewith, under the laws of the United States, precluded and debarred from enforcing or attempting to enforce the said judgments against the said plaintiffs in error or any property in their hands, and that the Court of Appeals should have so held and decided, and should have reversed the judgment of the Supreme Court of the State of New York on that ground, but the said Court of Appeals in fact decided the contrary thereof and affirmed the said judgment of the Supreme Court of the State of New York.

And the said Henry Moyer and Betsey Moyer pray the judgment aforesaid may be reversed, &c.

MATTHEW HALE,
Attorney for Plaintiffs in Error.

(Endorsed) "Assignment of Error.
M. HALE, *Att'y for Pl'ffs in Error.*"

SUPREME COURT OF THE UNITED STATES.

HENRY MOYER et al., Pl'ffs in Error,
vs.
JAMES E. DEWEY et al., Defts. in Error. } No. 756.

It is stipulated, that only the foregoing portions of the record, in the above entitled action, need be printed for the purposes of the motion to dismiss the writ of error and to affirm judgment or for purpose of argument on the merits, as the same are sufficient and all that is necessary for the argument and determination of all questions to be presented to, or determined by this Court thereon.

Albany. March 21st, 1879.

M. HALE,
Attorney and Counsel for Plaintiffs in error.
J. E. DEWEY,
Attorney and Counsel for Defendants in error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY MOYER AND BETSEY MOYER, IMPLEADED, ETC., PLAINTIFFS IN ERROR,
against
JAMES E. DEWEY ET AL., DEFENDANTS IN ERROR.

Brief for Plaintiffs in Error.

STATEMENT.

This is error to the New York Court of Appeals, to review the judgment of affirmance by that court of the judgment of the Supreme Court of that State, affirming a judgment on the report of a referee in favor of the defendants in error (these plaintiffs) against the plaintiffs in error (these defendants).

This action was brought by the plaintiffs (four in number), as judgment creditors of defendant Clinton Eldridge, for the purpose of collecting their respective judgments out of property alleged to have been fraudulently transferred by the judgment debtor to the defendants Moyer. (See complaint, pages 1 to 9 of record.)

The judgments were obtained as follows:

1st. Plaintiff Dewey's judgments:

1. Dewey, plaintiff, recovered July 5, 1858..	$119 68
2. Dewey, plaintiff, recovered June 27, 1870 (recovered on above judgment).....	227 10

3. Tuckerman, receiver of New York Central Insurance Co., verdict rendered July 1, 1858, judgment entered August 2, 1870,	$1,849 47
This judgment assigned to James E. Dewey, August 4, 1870.	
4. Dewey, plaintiff, recovered on above judgment (by confession) September 29, 1870	1,876 94
2d. Plaintiff James Reid's judgments:	
1. Recovered February 9, 1859, for.....	93 16
2. Recovered on above (by confession) June 27, 1870	174 42
3d. Plaintiff Dockstader's judgments:	
1. Recovered October 6, 1863.....	225 68
2. Recovered on above, June 27, 1870	338 85
4th. Plaintiff Coon's judgment:	
By confession, dated September 30, 1870	739 47

The following are, in substance, briefly stated, the facts with regard to the alleged fraudulent transfer of property by Clinton Eldridge to the defendant Moyer: (Referee's findings, p. 28 to 33.)

In 1852 Clinton Eldridge gave a note for $800 to the New York Central Insurance Company. In 1857 he was sued on this note by George S. Tuckerman, receiver of the insurance company. At the time Tuckerman's suit was commenced, Clinton Eldridge owned a farm in Schoharie county, upon which one Elihu Eldridge held a mortgage, on which the sum of $1,000 and one year's interest was due. At the same time, James Parsons had judgments against Clinton, amounting, in the aggregate, to $555.14 (fol.), and Henry Moyer had a judgment against him, rendered February 29, 1856, for $1,551.35. (Fol. 61.) After the receiver's suit was commenced, Clinton confessed judgment to Betsey Moyer for $778.34, which was duly entered May 1, 1858 (fol. 72), and Elihu Eldridge, by his attorney, Wm. H. Young, commenced a statutory foreclosure of his mort-

gage. Clinton's farm was sold under the foreclosure proceedings, June 5, 1858, to Seth Eldridge, for $4,374.66. Seth Eldridge conveyed the farm to Betsey Moyer, November 16, 1858, by a deed containing a warranty against incumbrances, except the judgments against Clinton, above referred to. (See Referee's findings, p. 28, and complaint.)

The plaintiff claims, referee finds, that the confession to Betsey was fraudulent and fictitious; that the foreclosure by Elihu, the purchase by Seth and his conveyance to Betsey was fraudulent, and designed to defraud Clinton's creditors, and especially the New York Central Insurance Company.

In December, 1867, Clinton Eldridge filed his petition in bankruptcy in the District Court of the United States, for the Northern District of New York: David J. Norton was duly appointed assignee in bankruptcy, and an assignment made to him by the register January 22, 1868 (pp. 20, 21, 22, record); August 17, 1868, Clinton Eldridge was duly discharged from his debts, etc., and a certificate given to him. (Pp. 26, 27 of record.)

This action was commenced by service of summons on the defendants Moyer, May 16, 1872. (P. 1.) Clinton Eldridge disclosed the facts which are alleged to constitute the fraud complained of to plaintiffs Dewey and Coons, in June, 1870. (Pp. 9, 32 of record.)

The referee found in favor of the plaintiffs. He found that the decree in bankruptcy discharging Clinton Eldridge from his debts was duly made upon due notice to plaintiffs (p. 33); that the indebtedness on which the judgments of plaintiffs were rendered accrued before the discharge, and were such as was provable against the estate of the judgment debtor in the bankrupt proceedings, and were not of the kind excepted by the bankrupt law from the effect of a discharge (p. 33); but that the defendant Eldridge, having waived his discharge, it was, under the pleadings in this action, unavailable to the other defendants as a defense, and that neither it, *nor the assignment connected therewith furnished any bar to the plaintiffs' right of recovery;* and that

under the pleadings and proof, *the plaintiffs have a perfect right to maintain this action*, and are entitled to judgment. (Fol. 570.) To these findings the plaintiffs in error Moyer excepted. (P. 34.) Among other things, to the finding of law, that the discharge and assignment and discharge of Eldridge was not a bar to plaintiffs' recovery, and because it did not find and conclude that the proceedings in bankruptcy, and the assignment of Eldridge and his discharge thereunder, under the act of bankruptcy, were not a bar to the recovery. This point was argued in Supreme Court of State and overruled there (one judge dissenting), and on appeal to the Court of Appeals it was there also overruled, and the plaintiffs in error bring the question here by this writ of error.

ERRORS ASSIGNED.

The errors assigned are the refusal of the State courts to regard the National Bankruptcy Act and to hold the defendants in error as having no standing in court or right of action as creditors of the bankrupt to recover his property or avails thereof, claimed to have been assigned by him to the plaintiffs in error in fraud of rights of creditors; and in holding that the confession of judgment by the bankrupt, on these prior debts of his after his discharge, waived this defense the plaintiffs in error had to the action under the bankrupt law.

These errors are especially raised and assigned in the exceptions to the report of the referee.

1st. In the 27th exception, viz.: "They except to the finding or conclusion that the defendant Eldredge, having waived his discharge in bankruptcy, such discharge is, under the pleadings in this action, unavailable to the other defendants as a defense, and that neither it, nor the *assignment* connected therewith, furnishes any bar to the plaintiffs' recovery."

2d. In the 28th exception, viz.: "They except to the

finding or conclusion of law that under the pleadings and proofs the plaintiffs have a perfect right to maintain this action."

3d. In the 31st exception, viz.: "They except to said report because it does not find that the proceedings in bankruptcy and the assignment of the defendant Eldredge and his discharge therein were a bar to the plaintiffs' right of recovery."

4th. In the 33d exception, viz.: "They except to the said report for that it should be in favor of these defendants and against the plaintiffs."

The law of New York makes these exceptions to the referee's report, which is final, and upon which judgment is entered up as a matter of course, similar in every respect to exceptions to rulings and decisions of the court in an equity case and the only method of assigning errors therein.

4th. These errors were specifically assigned, argued and were overruled both in the Supreme Court and the Court of Appeals. (See opinion of the latter, pp. 40, 41.)

POINTS OF LAW.

First. The State courts erred in not holding that the proceedings in bankruptcy and the assignment, and bankrupt's discharge therein, were a bar to the plaintiffs' right of recovery.

1. All the property of the bankrupt vested in the assignee under and by virtue of his appointment. All the property conveyed by the bankrupt in fraud of his creditors, is especially mentioned in the bankrupt act as at once vested in the assignee, in virtue of the adjudication of his bankruptcy and the appointment of his assignee.

   The language is, "all the property of the bankrupt of every kind, *including property conveyed by the bankrupt in fraud of his creditors*, and

all *rights of action* shall, in virtue of the adjudication," etc., * * * "*he at once vested in such assignee.*"

Bankrupt Law of 1867, § 14.
Jones v. Milbank, 6 Lans., 73.

2. No one but the assignee, since his appointment, has had a right to maintain an action to set aside a fraudulent conveyance. This is now expressly and fully adjudicated in this court.

Glenny v. Landon, 98 U. S., 20. See pp. 26, 27, 28, 29.
See also, Goodwin v. Sharkey, 5 Abb. (N. S.), 64.
Stewart v. Isidore, id., 68.
In re Meyers, 1 B. R., 162.
Thomas v. Phillips, 9 Penn. St., 355.
Pomeroy v. Lyman, 10 Allen, 468.
Williams v. Merritt, 103 Mass., 184.

(*a.*) Judge Clifford, in 98 U. S. (*supra*), says: "He (the creditor and plaintiff) admits what cannot be denied, that the entire property of the bankrupt, except what is reserved by the operation of the act, vests in the assignee by virtue of the instrument of conveyance required to be made as soon as the assignee is appointed and qualified. Due conveyance of this kind was made in this case. Nor does he attempt to controvert the proposition that the assignee is the only party designated by the bankrupt act as the proper claimant of the bankrupt's property and estate. The grounds of recovery, as stated in the bill of complaint, are that, before filing the same, he made application to the assignee to proceed by bill in chancery or other proper mode, or allow his name to

be used for that purpose, to subject the said property and rights of the bankrupt fraudulently concealed and retained, and to convert the same into money to be paid and distributed to the creditors, which he, as such assignee, declined and refused to do. Viewed in the light of these allegations, the theory of the complainant is, that the assignee, inasmuch as he declined to comply with the request, and refused either to bring the suit or to allow his name to be used to recover the rights of property of the bankrupt, was guilty of a fraud against the creditors, and that the latter, by virtue of such request and refusal, had a right to seek a remedy in their own names, not only against the bankrupt and the possessor of the concealed property and estate, but also against the assignee."

The learned judge, after showing that if such an action would lie (and the present is, of course, no such action), it would not be, between residents of same State, of Federal jurisdiction, proceeds to show that a creditor cannot, in any event, bring such action. "Creditors can have no remedy which will reach property fraudulently conveyed, except *through the assignee*, for two reasons: 1. Because all such property, by the express words of the bankrupt act, vests in the assignee by virtue of the adjudication in bankruptcy and his appointment. 2. Because they cannot sustain any suit against the bankrupt. * * * They can have no remedy

which will reach such property, except through the assignee, not only for the reasons already assigned, but because their remedies are absorbed in the great and comprehensive remedy under the commission, by virtue of which the assignee is to collect and distribute among them the property of their debtor." * * * Nor is that the only objection to the theory advanced by complainant, for if one creditor may sue in such a case, then all may sue, and the result might be that the proceedings in bankruptcy would be transferred not only to the Circuit Court, *but to every State court within whose jurisdiction* a defendant may reside. * * * Creditors, said Lord Cottenham, cannot maintain a suit to recover the property or rights which belong to the insolvent. * * * (Heath v. Chadwick, 2 Ph., 649.) *Prima facie* the bankrupt is divested of the whole estate; nor have the creditors any right to sue, but if it be represented that the assignees will not sue, the court, having jurisdiction, may direct the recusant assignees, to proceed," etc.

Benfield v. Solomon, 9 Ves., 82, pp. 28, 29, 30.

3. The discharge granted to Clinton Eldridge was from all his *debts*, except those specifically excepted by the act. (Bankrupt Law, § 32; and as to effect of discharge, see id., § 34.) And the debts were discharged although the judgment was rendered after the filing of the petition.

Monroe v. Upton, 50 N. Y., 593.

4. After the judgment debtor is discharged in bankruptcy, a creditor cannot proceed against his fraudulent transferee. This was held under the bankrupt law of 1841, by the Court of Appeals of Kentucky in Botts v. Patton (10 B. Mon., 452). That was a suit brought against Patton and one McCorkle, to subject to the payment of debts due to the plaintiffs from Patton, the estate of the defendant, which was alleged to have been fraudulently transferred to McCorkle, and to be held by him in fraud of creditors. The property consisted in part of a promissory note of $1,000 and a negro boy. The court held that the transfer was fraudulent, but also held that as he was a discharged bankrupt, and no longer liable for the judgments at law, McCorkle could not be required to pay them out of the estate in his hands. The same doctrine has been held by the Court of Appeals in this State in relation to the bankrupt law of 1867, in the case of the Ocean Bank v. Olcott (46 N. Y., 12). That was an action in the nature of a creditor's bill brought against Cornelius Olcott, the judgment debtor, and his wife Kate G. Olcott. The complaint alleged that, since the judgment, the defendant Cornelius had paid, of his own moneys, for certain real estate, the conveyance of which was taken in the name of his wife, the other defendant. The answer denied the allegations of fraud, and set up as a defense, that since the judgment, and before this action was commenced, the defendant Cornelius Olcott had obtained a discharge in bankruptcy under the act of 1867, and was thereby fully discharged from his debts. The plaintiff replied to the defense of the discharge in bankruptcy, alleging that it was fraudulently obtained, and setting forth the

frauds complained of. The defendant demurred to the reply as not stating facts sufficient to constitute a reply. The Court of Appeals held: First, that the discharge in bankruptcy could not be impeached in a State court; and, second, that the discharge in bankruptcy was available not only to the husband, the bankrupt, but to his wife, the alleged fraudulent grantee.

And what is decisive of the present case on this point it is expressly held in Glenny v. Landon (98 U. S., *supra*), that even the refusal of the assignee to sue, gave a creditor no standing in court against the transferee. The only remedy was to apply to the proper court to compel assignee to sue or be allowed to sue themselves in his name.

5. The confessions of judgment to original plaintiffs by the bankrupt, subsequent to the discharge, do not aid the plaintiffs or affect the rights of the assignee or the defendants. They amount simply to a new promise and create a *new debt*, enforceable only against newly-acquired property of the bankrupt.

Dupuy v. Swart, 3 Wend., 135, 139.
Baker v. Wheaton, 5 Mass., 509, 512.
Linbury v. Weightman, 5 Esp., 198, note.
Roberts v. Morgan, 2 Esp., 736.
Stearns v. Tappan, 5 Duer, 294, 299.
Carson v. Osborn, 10 B. Mon., 155.
Rice v. Maxwell, 12 Sm. & Marsh. (Miss.), 280.

6. The decision in the case of Dusenbury v. Hoyt (53 N. Y., 521, 523) in no way conflicts with the cases last above cited. This case relates only to the *rule of pleading*, as is expressly stated by Judge Andrews, on page 524. And the opinion

of Judge Marcy in Dupuy v. Swart (above cited) is approved of as best supported by authority. Indeed, Judge Marcy, in his opinion, says that "it is well established that the plaintiff may declare on the original cause of action." (3 Wend., 141.) He adds, however, that this rule is a deviation from the general rule, and somewhat inconsistent with the settled law as to the old promise being only important as furnishing the *consideration* for the new. The difference between the effect of a discharge in bankruptcy and that of the statute of limitations, is well considered by Judge Marcy in the last cited case. The discharge in bankruptcy *discharges the debt* — the statute of limitations merely *takes away the remedy.* It is only "in point of pleading," as Judge Andrews says (53 N. Y., 523), that the defense of a discharge in bankruptcy is like that of infancy or the statute of limitations.

7. It was claimed on the argument in the court below that the adjudication, assignment and discharge in bankruptcy were not available to these plaintiffs in error, because of the provision of the second section of the bankrupt law that no suit at law or in equity shall be maintainable by an assignee in any court *unless the same be brought within two years* from the time the cause of action accrued. It was argued that the cause of action accrued immediately on the appointment of the assignee, January 22, 1868, and that the alleged fraud not having been discovered until June, 1870, after the two years had expired, the assignee could not sue, and therefore, *ex necessitate*, the individual creditors must have a right of action. But whatever plausibility there may have been in this position is removed by the decision

of the Supreme Court of the United States in the case of Bailey v. Glover et al, (21 Wall., 342), in which it was held, that where the action was brought to obtain redress against a fraud concealed by the party, or which, from its nature, remained secret, the bar does not commence to run until the fraud is discovered. The claim of the plaintiffs in the complaint (p. 9), and findings (p. 32), is that the alleged fraud was not discovered until June, 1870. Upon such discovery, then, they had a perfect remedy under the bankrupt law, by informing the assignee of the discovered fraud, and requesting him to bring suit (original bankrupt law, § 34), two years not having elapsed from the time of his discharge, and on his refusal to apply to the Federal Court to compel action, and this was their only remedy.

And the assignee could have maintained an action to recover assets which the bankrupt had fraudulently transferred, after the discharge, within two years.

Jones v. Milbank, 6 Lans. 73 (N. Y. Sup. Ct.)

But the discharge could be impeached, or its effect questioned, only in the court which granted it.

Ocean Bank v. Olcott, *supra*.
Corey v. Ripley, 57 Maine, 69.
Hudson v. Bingham (Sup. Ct. Term), 8 Nat. B. R., 494.

8. It is claimed that only the bankrupt can avail himself of the discharge; but we submit this question is decided the other way by this court in Glenny v. Landon (*supra*), by the Court of Appeals of New York in the Ocean Bank v. Olcott (*supra*), as well as by the Kentucky case

above cited. In both of these last cases the alleged fraudulent transferee was allowed to avail himself of the discharge in bankruptcy in a suit brought like this, to reach property alleged to be fraudulently transferred, in the hands of the fraudulent grantee. In both cases the defense was sustained.

9. But it is difficult to see how the negligence of the assignee divests any title to the fraudulently transferred property he has. If, under the bankrupt law, the whole title is in the assignee, and the creditor's only remedy is through him, if they neglect to force him to bring suit as they could, the remedy is not the more their own without him. His title they cannot attack.

10. It was argued, however, and perhaps decided below, that the plaintiffs could reach the property transferred to the defendants Moyer, because the bankrupt is *willing that they should.* The absurdity of this doctrine is palpable. All of the bankrupt's property was, under the bankrupt proceedings, conveyed to his assignee for the benefit of creditors. The title was absolutely in him, as much so as in a trustee in New York. It ceased to be the bankrupt's, and became the property of the assignee, for the use of creditors. He was afterwards discharged by decree. Before the bankruptcy proceedings, Eldridge could not have compelled a restoration to himself of property which he had conveyed with the intent to cheat his creditors, although his then existing creditors could reach it. After he was adjudged a bankrupt and his assignee appointed, the assignee could sue for a recovery of the property fraudulently transferred, and no one

else could do so. After his discharge it is well-settled, that no creditor, whose debt was discharged, could reach property fraudulently conveyed, even if the bankrupt joined the fraudulent grantee in resisting such claim. It seems clear then, inasmuch as after the bankrupt's discharge, the creditors had no legal mode in law or in equity of reaching the property fraudulently transferred, that the bankrupt could not give it.

It would be very strange if one, who could not in law or in equity maintain proceedings to compel the restoration of this property, *before* his bankruptcy, could, *after* procuring a discharge, at his option either permit or prevent a creditor reaching it. The doctrine of the plaintiffs makes the rights of the creditors, after a discharge, wholly dependent on the will of the debtor, so far as relates to property fraudulently transferred before the proceedings were commenced. The object of the bankrupt law was to secure equality and to prevent preferences among creditors. But if the plaintiff's doctrine is correct, this law enables a bankrupt absolutely and without risk, to prefer one creditor to another. His *modus operandi* is very plain, (1) He must fraudulently convey away his property; (2) apply for a discharge in bankruptcy, and by fraud and perjury conceal his former fraud from the assignee; (3) confess judgment to a favorite creditor with whom he is in collusion, leaving all others out. Then, according to the doctrine of the plaintiff, sustained by the State courts, his repeated and persevering frauds and perjuries are rewarded, by permitting him to give a preference which is denied to an unfortunate debtor, who is too honest to be willing

to go through with the necessary preliminaries of fraud and perjury.

The bankrupt law may be imperfect and harsh in its operation, but it cannot be made to work such absurd inequality and injustice as would inevitably result were the doctrine of the plaintiffs to prevail.

SECOND. The proceedings in bankruptcy were sufficiently pleaded. (See answer of Betsey Moyer and of Henry Moyer.)

1st. Under the system of pleading in force in New York, it is clear that "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made."

New York Code, § 161.

A fact necessarily understood or implied forms a part of a pleading as much as if specifically alleged, and a direct allegation of such fact, although proper, is never necessary.

Partridge v. Badger, 25 Barb., 146, 170.
Hunt v. Bennett, 19 N. Y., 173.
2 Wait's Practice, 315, and cases there cited.

It is unnecessary to state in pleading matter of which the court takes judicial notice.

Swennerton v. Insurance Co., 37 N. Y., 174.
People v. Snyder, 41 N. Y., 397.
Shaw v. Tobias, 3 Conn., 188, 190.

And the court will take judicial notice of the public statutes of the United States.

Jack v. Martin, 12 Wend., 311, 329.
Platt v. Crawford, 8 Abb. (N. S.) 297, 304.

The pleading of the discharge in bankruptcy, therefore, in the manner prescribed by the Code is, in fact, the averment of every act necessary to be done under the act to procure such a discharge. Before the discharge could be granted it must appear to the court "that he (the bankrupt) has in all things conformed to his duty under this act." (Section 13.)

But among the things necessary to be done under the bankrupt law, before a discharge could be granted, was the appointment of an assignee (section 13), and the assignment to him, by a judge or register, of all the estate, real and personal, of the bankrupt, which assignment related back to the commencement of the proceedings in bankruptcy, and upon the execution whereof, by operation of law, the title to all such property vested in the assignee. Indeed, an assignment does not seem to have been necessary to transfer the property to the assignee. The statute provided that all the property conveyed by the bankrupt in fraud of his creditors (and all his other property not specially excepted (should, *in virtue of the adjudication in bankruptcy and the appointment of his assignee*, be at once vested in such assignee. (Section 14.)

Clifford, J., 98 U. S., *supra.*

The appointment of the assignee, therefore, was a necessary incident to the bankrupt's discharge; was alleged necessarily by a statement of the discharge, and is sufficiently pleaded by

setting up the discharge in the manner required by the Code.

It is said in the opinion below that the plea of bankrupt's discharge may be construed as only setting up that the plaintiffs' debt were discharged; but it is difficult to suppose that such a plea would be made for that purpose, when the judgments stated were all *after* the *discharge*. Indeed, it is difficult to see why these plaintiffs in error pleaded the discharge at all *except* as showing the defendants had no cause of action.

2d. But again, if there was a defect in the pleading in this respect, it should have been insisted on upon the trial. If taken before the referee, he supposed it good, he might have permitted an amendment. The plaintiff cannot permit proof to be given without objection as to the pleading that an assignee was appointed, and the referee ruled that such assignee's appointment was no obstacle to a recovery, and afterwards object that the pleadings did not permit any effect to be given to the evidence thus introduced.

Currie v. Cowles, 6 Bosw., 452
White v. Spencer, 4 Kern., 247.
Chaffee v. Morse, 67 Barb.

3d. The proof showing that the plaintiffs had no title or interest in the property sought to be reached, at the time this action was commenced, their complaint should have been dismissed. It was not necessary to take the objection before the trial. The twenty-seventh, twenty-eighth, thirty-first, thirty-third exceptions raised the question.

Mosselman v. Caen, 1 Hun, 647.
Davis v. The Mayor, etc., 4 Kern., 506, 526.
Greene v. Breck, 10 Abb., 42.
De Witt v. Chandler, 11 id., 459.

But a conclusive answer in this court is that in the trial court objection to the evidence was overruled, the evidence admitted, and hence no request for amendment asked, and that tribunal concludes against the assignment as a bar.

4. The proceedings in bankruptcy having been received in evidence by the referee, this court will not consider whether or not he erred in overruling the plaintiffs' objections thereto. If the objections had been sustained the defendants might have offered additional proof. But they were in fact sufficiently authenticated and were properly received.

Laws of 1845, chap. 303.
4 Stat. at Large, 641.

THIRD. As to the question of jurisdiction of this court, to entertain this writ, the plaintiffs in error respectfully refer to the brief already submitted on the motion to dismiss.

MATTHEW HALE,
Atty. and of Counsel for Plffs. in Error.

SAMUEL HAND,
Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 756.

HENRY MOYER AND BETSEY MOYER. IMPL'D, ETC.,
PLAINTIFFS IN ERROR,

against

JAMES E. DEWEY, ET AL.

In Error to Court of Appeals of the State of New York.

Brief of plaintiffs in error, in opposition to motion to dismiss, etc.

MATTHEW HALE,
Attorney and of Counsel for Plaintiffs in Error.

ALBANY,
JOEL MUNSELL, PRINTER.

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Attorney and of Counsel for Plaintiffs in Error.

ALBANY,
JOEL MUNSELL, PRINTER.
1879.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Henry Moyer & Betsey Moyer, Impleaded with Clinton Eldredge, *Plaintiffs in error,* *against* **James E. Dewey, and others,** *Defendants in error.*	*No.* 756. *In error to the Court of Appeals of the State of New York.*

Brief of Plaintiffs in Error, in opposition to Motion to Dismiss and Affirm.

This was a suit in the nature of a creditor's bill, brought in the Supreme Court of the state of New York, to set aside certain conveyances alleged to have been made by the defendant, Clinton Eldredge to the plaintiffs in error, in fraud of his creditors.

The complaint may be found on pages 1–9 of the record. It sets forth certain judgments against Clinton Eldredge obtained in 1858, 1859, 1863 and 1870 (page 2); sets forth alleged fraudulent transfers and prays for a decree that such transfers be declared fraudulent and void, and that the Moyers account for the effects of Clinton Eldredge alleged to remain in their hands (page 9). The plaintiffs in error, defendants in said suit, answered sepa-

rately. They denied the allegations of fraud, and also alleged that on or about the 17th day of August 1868, at Buffalo in the state of New York, the United States District Court held in and for the Northern District of the state of New York, duly made an order and a decree discharging the defendant Clinton Eldredge of and from all his debts, of all which proceedings in the said court in bankruptcy for such discharge the plaintiffs in said action and assignors, and each of them, had due notice; that the pretended indebtedness, if any such existed or ever did accrue, accrued prior to the filing of the petition of the said Clinton Eldredge for his discharge from said debts in the said United States District Court and prior to the granting of such discharge, and that the said indebtedness, and the said several claims, if any such exist, or ever existed, were such as were provable against the estate of the defendant Clinton Eldredge in the proceedings in which said discharge was granted, and were not, nor was any part thereof, created in consequence of any defalcation as a public officer, or as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity, and he is, therefore, discharged therefrom, and from all liability thereon, and the said plaintiffs are precluded and debarred from enforcing or attempting to enforce the same."

See Betsey Moyer's answer, paragraph 11, pages 12 & 13.
See Henry Moyer's " " 10, page 16.

The answer of Betsey Moyer also alleged that the claims stated in the complaint were not valid, legal, subsisting claims against the defendant Clinton Eldredge, at the time said judgments were obtained and recovered against him, by reason of lapse of time and by reason of his discharge from all his debts in the said United States District Court, but that said judgments were fictitious and obtained by collusion with Clinton Eldredge, upon an agreement that they should not be enforced against Clinton Eldredge,

but that they should be only a charge, or attempted to be collected of and against the defendants Moyer for the mutual benefit of the plaintiffs and the defendant Clinton Eldredge, paragraph 12, page 13.

It was also alleged by both plaintiffs in error, that the plaintiffs below and their assignors had full knowledge, for a period exceeding two years before the commencement of the action, of all the facts constituting the pretended fraudulent transactions mentioned in the complaint (pages 12, 16), thus controverting an allegation of the complaint on pages 8 and 9.

The case was tried before a referee. On the trial witnesses were examined on both sides as to questions of fact, and oral and written evidence introduced by both parties; and the defendant, after the plaintiffs had rested their case, offered in evidence the papers showing his discharge in bankruptcy, including the assignment made by the register, pursuant to the statute, to his assignee David J. Norton. The assignment was made January 22, 1868 (page 22). The order for his discharge was made August 17, 1868 (page 26). The referee by his report found in favor of the plaintiffs. The alleged fraudulent conveyances were in 1858 (page 29). The referee found that Eldredge was duly discharged from all his debts by the decree of the United States District Court on the 17th day of August, 1868, as alleged in the answer; that the judgments rendered in 1870, upon which the suit was brought, were each of them for indebtedness of Clinton Eldredge, which accrued before the granting of the discharge, and the said indebtedness was such as was provable against the estate of Eldredge in the bankruptcy proceedings, and was not, nor was any part thereof, created in consequence of a defalcation as a public officer, nor as an executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity (page 33).

The referee found as conclusion of law that the de-

fendant Eldredge having waived his discharge in bankruptcy, such discharge is, under the pleadings in this action, unavailable to the other defendants as a defence, and neither it nor the assignment connected therewith, furnishes any bar to the plaintiffs' right of recovery in this action. Also that under the pleadings and proofs, the plaintiffs have a perfect right to maintain this action, and are entitled to judgment therein.

To these findings, the plaintiffs in error duly excepted (see stipulation at end of this brief, p. 14); and they also excepted to the report because it did not find that the proceedings in bankruptcy and the assignment of the defendant Eldredge and his discharge therein, were a bar to the plaintiffs' right of recovery (page 34.)

Judgment was entered on this report in favor of the plaintiffs against the defendants Moyer, the plaintiffs in error. Upon appeal to the General Term of the Supreme Court this judgment was affirmed, Judge Bockes dissenting. Upon appeal to the Court of Appeals, the judgment of the Supreme Court was affirmed; and the judgment of the Court of Appeals is brought by writ of error to this court; the plaintiffs in error assigning for error, that they were entitled in the Court of Appeals to a reversal of the judgment of the Supreme Court of the state of New York, on the ground that the judgments on which the action was based were not valid, legal, subsisting claims against the said Clinton Eldredge for the reason that the said Clinton Eldredge had been discharged from the same in the United States District Court by a decree in bankruptcy made in the United States Court, and that the defendants in error were, by reason of said proceedings and discharge in bankruptcy and assignment connected therewith, under the laws of the United States precluded and debarred from enforcing or attempting to enforce, the said judgment against the plaintiffs in error, or any property in their hands; and that the Court of Appeals should have

so held and decided, and should have reversed the judgment of the Supreme Court of the State of New York on that ground (page 46).

POINTS.

FIRST. The record shows that the plaintiffs in error claimed immunity under a statute of the United States, viz: under section 34 of the bankrupt law of 1867, and the discharge in bankruptcy granted by virtue thereof to Clinton Eldredge, the original judgment debtor, by the District Court of the United States for the Northern District of New York and the proceedings connected therewith. This appears (1) from the answer above quoted, (2) from the evidence of the discharge and the proceedings connected therewith given upon the trial, and (3) from the findings of the referee and the exceptions thereto. It also appears from the opinion of the Court of Appeals found in the record at pages 37–42. The claim was, in the language of the exception on page 34, "that the proceedings in bankruptcy and the assignment of the defendant Eldredge and his discharge therein were a bar to the plaintiffs' right of recovery." The decision was against such claim of immunity, thus bringing the case directly within the provisions of § 709 of the Revised Statutes.

SECOND. Whether this claim of immunity was well founded or not can not be considered upon this motion. The claim was made and the decision was adverse to it.

Within the principle laid down by this court in Murray *vs.* Charleston (96 U. S. (6 Otto), page 432), it is clear that the case turned, and must have turned, on a federal question, because judgment could not have been rendered for plaintiff without overruling our claim of immunity under the bankrupt law.

THIRD. The discharge was sufficiently pleaded. The N. Y. Code provides that "In pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made."

N. Y. Code of Procedure, § 161.

Indeed it is conceded in the opinion of the Court of Appeals that the *discharge* is well pleaded. The only criticism upon the answer being that the *assignment* was not pleaded as a defence, see opinion (pages 38 to 40 of record). If the fact of the discharge with all that it implied, constituted a defence, the plaintiffs in error were entitled to the benefit of it. Whether this was or was not a valid defence was a question necessarily involved in the case, and the decision of the State Court was adverse to our claim of immunity under the bankrupt law.

FOURTH. The assignment was necessarily involved in the discharge. No discharge could be had without an assignment.

Bankrupt Law of 1867, §§ 13, 14.

A fact necessarily understood or implied forms a part of a pleading as much as if specifically alleged, and a direct allegation of such fact, although proper, is never necessary.

Partridge vs. Badger, 25 Barb., 146, 170.
Hunt vs. Bennett, 19 N. Y., 173.

It is unnecessary to state in pleading matter of which the court takes judicial notice.

Stephens on Pleading, 351, 2, 3.
Swennerton vs. Insurance Co., 37 N. Y., 174.
People vs. Snyder, 41 N. Y., 397.
Shaw vs. Tobias, 3 Com., 188, 190.

And the court will take judicial notice of the public statutes of the United States.

Jack vs. Martin, 12 Wend., 311, 329.
Platt vs. Crawford, 8 Abb. (N. S.), 297, 304.

When therefore the answer averred a discharge of Clinton Eldredge in bankruptcy, it averred the fact that by assignment, all the property of the bankrupt, including all property conveyed in fraud of creditors, had become vested in an assignee, as trustee, not for subsequent creditors, but for creditors whose debts had accrued prior to the adjudication in bankruptcy.

See Bankrupt Law, §§ 14, 19.

FIFTH. This case is not at all within the principle of Long *vs.* Converse (91 U. S., 105), relied upon by the defendants in error on this motion, nor within any of the cases cited by the chief justice in his opinion in that case. There the receivers appointed by the State Court, and the assignees in bankruptcy, both represented the same creditors; and the assignees assented to the recovery of judgment by the receivers. The plaintiffs in error do claim, for themselves, immunity under the bankrupt law and the proceedings proved. The referee found that neither the discharge nor the assignment connected therewith, furnished any bar to the right of recovery of the plaintiffs below, the defendants in error (page 35); and to this finding the plaintiffs in error excepted (see stipulation annexed hereto); and claimed that the referee should have found the contrary (exception 31st, page 34). The immunity claimed by us here is not, as in Long *vs.* Converse, and the other cases cited, a claim of title or right for some one else under whom we do not claim, as stated by defendants in error in their brief on page 6; but a claim for ourselves, from the bankrupt proceedings, including the assignment, for immunity from this suit.

The claims upon which the action was brought existed before the discharge, which was in 1868. The alleged fraudulent transfers were long prior to this time (see findings 8th to 16th inclusive, pages 29, 30). After the discharge the bankrupt confessed judgment on these

claims, thus waiving his discharge so far as it was a personal defence to him, or protected him from personal liability. This did not revive the old debts, or give to these judgment creditors any lien on the assets of the bankrupt which had vested in the assignee. It created a new debt enforceable only against newly acquired property of the bankrupt. (See opinion of court below, page 38).

De Puy vs. Swart, 3 Wend., 135, 139.
Baker vs. Wheaton, 5 Mass., 509, 512.
Carson vs. Osborn, 10 B. Mon., 155.
Rice vs. Maxwell, 12 Sm. & Marsh (Miss.), 280.

These new creditors had no claim, whatever, upon property transferred by the bankrupt in fraud of his creditors before his discharge. As to that property the defendants in error had no right more than any stranger. If such property was in fact held under a fraudulent conveyance, the assignee in bankruptcy, and he alone, could reach it, for the benefit of creditors, at the time of the adjudication, not of subsequent creditors. The proceedings in bankruptcy and the assignment connected therewith are claimed by the plaintiffs in error to have been a bar to this action, for the reason, that by those proceedings, all the property of the bankrupt, whether fraudulently conveyed or not, became vested in the assignee for the sole benefit of pre-existing creditors; and if by delay, neither the assignee nor the creditors whom he represented, claimed or sued for this property within the time provided by section 2, the statute of limitation became a bar, and we could claim immunity under it, as we did at page 12, paragraph 10, of answer. The property was not in any event subject to claims of *subsequent* creditors, whose debts were created by the act of the bankrupt after the discharge. In other words we claimed immunity under the bankrupt law, after a discharge, from suits to be brought by subsequent creditors to reach property which by the bankrupt proceedings had vested in the assignee for the benefit of pre-existing creditors.

SIXTH. The jurisdiction of the court then is clear upon the record. But the defendants in error allege that the claim of immunity made by plaintiffs in error is *frivolous* and that the judgment should be affirmed upon that ground. This position is entirely untenable.

1. There is no authority for it. This court will not decide a case upon motion and dismiss a writ of error, because it is claimed that the plaintiff in error upon the argument will not prevail. None of the cases cited by the counsel for the defendants in error sustain the proposition that this court will affirm a judgment summarily, without oral argument, upon motion based upon alleged frivolousness of a claim of immunity under the laws of the United States.

2. In this case, one of the ablest judges of the Supreme Court of the state of New York dissented from the opinion of a majority of his brethren, and gave, in a very learned and elaborate opinion, reasons for sustaining the position which we now take, and deciding that the present defendants in error were barred, by reason of the provisions of the bankrupt law, and the proceedings thereunder given in evidence, from maintaining this action. In other words, he held, that the plaintiffs in error should be sustained in their claim of immunity under the bankrupt law. See opinion of Mr. Justice Bockes in the original record on file; also reported in 16 N. Y., Sup. Ct. Rep. (9 Hun), 483.

3. The position of the plaintiffs in error is supported by the following authorities:

Botts vs. Patton, 10 B. Mon., 452.
McCabe vs. Cooney, 2 Sandf. Ch., 314.
Thurman vs. Andrews (Court of Appeals, Ky.), 13 N. B., Reg., 157.
Ocean Bank vs. Olcott, 46 N. Y., 12.

In all these cases, the first two arising under the bankrupt law of 1841, the last two under the law of 1867, it

was held that a discharge in bankruptcy was available, not only to the bankrupt, but to his alleged fraudulent grantee. And this was conceded by the Court below. (See opinion, page 38.) And it has been repeatedly held, and must be considered as settled law, that a discharge could be impeached or its effect questioned only in the court which granted it.

Ocean Bank vs. Olcott (*supra*).
Corey vs. Ripley, 57 Maine, 69.
Hudson vs. Bingham (Sup. Ct. Tenn.), 8 Nat. B. R., 494.

4. The only answer to the cases last cited made on behalf of the defendants in error is, that the bankrupt waived his discharge. This is found by the referee in his first conclusion of law (page 33). But a bankrupt can not by his own act, after a discharge, give to a portion of his creditors a right of property of which he had been divested, and which belongs exclusively to the assignee in trust for all his creditors. If he could he would be able to defeat the great object of the bankrupt law, and to give a preference which the law forbids. To do this he must (1) fraudulently convey away his property, (2) apply for a discharge in bankruptcy and by fraud and perjury conceal his former fraud from the assignee; and (3) confess judgment to a favorite creditor with whom he is in collusion. Thus, if the doctrine of this case is sustained, a premium is given to fraud, by enabling a fraudulent and perjured debtor to give a collusive preference, from which an honest, unfortunate debtor is precluded.

SEVENTH. It is not deemed necessary or proper here to make an extensive argument on behalf of the plaintiffs in error. This motion to affirm, as well as to dismiss, is probably designed to draw out such argument in advance of the cause being regularly reached.

The position and points of the plaintiffs in error have been only indicated by the above observations.

We insist that the record shows jurisdiction; that a claim of immunity under a statute of the United States was made by the plaintiffs in error, and the decision was adverse to it; and that this Court can not, and will not, upon a motion, decide whether the claim of immunity made was, or was not, a valid one. This is a question to be argued upon the merits, when the cause is reached; and the plaintiffs in error intend in good faith to present that question to the Court, in confidence that they will then be able to show that their claim of immunity is well founded.

If the Court should consider the question as to the alleged frivolousness of the claim of immunity under the bankrupt law, made by the plaintiff in error and overruled by the New York Courts, then it is submitted that a denial of the claim, that a fraudulent and perjured bankrupt, may, by confessing judgment to a favored creditor, revive a claim to property transferred before a discharge, after the expiration of the term within which the assignee, representing all the creditors, may sue, and thus give a preference in defiance of the bankrupt law, is very far from being frivolous.

The motion should be denied with costs. The counsel for the plaintiffs in error will be ready to argue the case on the merits whenever this court may be ready to hear it.

MATTHEW HALE,

Attorney and of Counsel
for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

Henry Moyer & Betsey Moyer,
Impleaded, etc., *plaintiffs in error.*
against
James E. Dewey and others.

Stipulation.

It is hereby stipulated that the following exceptions, which were duly taken by the plaintiffs in error, and were by mistake omitted from the printed record, be considered as inserted between the 3d and 4th lines of page 34 of the printed record:

Twenty-seventh. They except to the finding or conclusion of law that the defendant Eldredge, having waived his discharge in bankruptcy, such discharge is, under the pleadings in this action, unavailable to the other defendants as a defense, and that neither it, nor the assignment connected therewith, furnishes any bar to the plaintiffs' right of recovery in this action.

Twenty-eighth. They except to the finding or conclusion of law that, under the pleadings and proofs, the plaintiffs have a perfect right to maintain this action.

Dated April 8, 1879.

J. E. DEWEY, *Attorney for Defendants in Error.*
M. HALE, *Attorney for Plaintiffs in Error.*

No 191.

For Court Points below for Defts in E

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK.

James E. Dewey, James Reid, Ephraim Dockstader, & Alonozo B. Coons, Respondents,

against

Henry Moyer & Betsey Moyer, Appellants, Impleaded with Clinton Eldredge.

RESPONDENTS' BRIEF AND POINTS.

This appeal is by the defendants, Henry and Betsey Moyer, from a judgment of the general term in third judicial department affirming a judgment, entered upon a referee's report, in favor of the plaintiffs.

Action—a creditor's suit, commenced in May, 1872, (fol. 455), to reach the debtor Eldredge's property held by the appellants in fraud of his creditors, and to require them to satisfy plaintiff's judgments recovered, in 1870, on former judgments, and upon which all remedy at law had been exhausted, (Comp't fols. 456–97).

There was no appearance by the debtor Eldredge (fols. 165, 455).

The Moyers answered, substantially admitting the complaint, except they denied any fraud or knowledge &c., of said judgments and executions (fols. 500-16, 524-36); and they alleged, as *their only* affirmative defence,

Eldredge's *discharge* in bankruptcy, by a *decree* made in August, 1868; that plaintiffs' demands accrued prior thereto, *and that Eldredge "is therefore discharged therefrom, and from all liability thereon"* (fols. 516-18, 536-7).

Trial — before a referee, Hon. A. D. Wait, who reported the *facts* fully (fols. 544-69), and directed judgment for the relief sought (fols 570-2), which was entered (fols. 573-7).

The Moyers made a case and exceptions, appealed to the general term, where the judgment was affirmed (fols. 581-6. *See Opinions* 591-657), and then appealed to this court.

The referee's findings contain a full statement of the facts established by the pleadings and proofs (fols. 544–67), except the plaintiffs' several demands, judgments, executions, etc., against Eldredge, were found (fol. 545), to be as alleged in the complaint (*which see at* fols. 457–69); and they were proved (fols. 16–45, 72–92), as follows:

1. *Plaintiff Dewey's First Judgment.*

Roll filed July 5, 1858, for $119.08; docketed in Scho. Co. July 8, 1858; suit commenced June 12, 1858; executions issued and returned unsatisfied, from time to time, to Nov. 2, 1866 (fols. 16–18).
Judgment by confession on same, and roll filed June 27, 1870, for $227.10; execution returned unsatisfied Oct. 18, 1870 (fol. 18).

2. *Plaintiff Reid's Judgment.*

Roll filed in Scho. Co. Feb. 9, 1859, for $93.16; suit commenced Aug. 26, 1858, on note dated May 22, 1858; executions issued and returned unsatisfied, from time to time, to Nov. 25, 1864 (fols. 18–20).

Judgment by confession on same, and roll filed June 27, 1870, for $174.42; execution returned unsatisfied Oct. 18, 1870 (fol. 20).

3. *Plaintiff Dockstader's Judgment.*

Roll filed Oct. 6, 1863, for $225.68, in Scho. Co.; suit commenced April 23, 1863, on note dated Jan. 8, 1858; executions issued and returned unsatisfied, from time to time, to November 25, 1864 (fols. 20–21.)

Judgment by confession on same, and roll filed June 27, 1870, for $338.85; execution returned unsatisfied Oct. 18, 1870 (fol. 21).

4. *Plaintiff Dewey's Second Judgment.*

Judgment roll, Supreme Court, Otsego Co. Olcott, president, etc., against the N. Y. Cent. Ins. Co., filed Feb. 29, 1856; adjudging said company insolvent and appointing Tuckerman receiver; his bond approved and filed June 20, 1856. Judgment roll, Tuckerman, receiver, etc., against Clinton Eldredge, filed August 2, 1870, for $1,849.47, including interest and costs; suit commenced Dec. 22, 1857, on note dated Jan., 1852, for $800; trial at Circuit July 1, 1858, and verdict for plaintiff $930; docketed in Scho. Co. Aug. 5, 1870 (fols. 22–24). Order for receiver to assign same to plaintiff Dewey (fols. 24–8), and assignment thereof to him by the receiver, (fols. 28–36), in consideration of his *release of all claims for services* against said insurance company (fol. 30).

Judgment by confession on same in favor of Dewey, and roll filed Sept. 30, 1870, for $1,876.94 in Scho. Co.; execution returned unsatisfied Oct. 18, 1870 (fols. 38–45).

5. *Plaintiff Coon's Judgment.*

Judgment roll on confession, filed in Scho. Co. Oct. 3, 1870, on various demands which accrued from 1857 to 1865, for $749.47; execution issued and returned unsatisfied Oct. 18, 1870 (fols. 72–92).

RESPONDENTS' POINTS.

I. The *objection* now urged, that the creditors' right to recover what the Moyers hold in trust for them passed to the debtor's assignee, was not raised or suggested by their answers, or in giving their proofs on the trial. But, if it had been, its only merit or substance is, that they fear the spirit of the bankrupt law, as to an equal distribution of the property among creditors, will be violated unless the fraudulent holders are allowed to keep it.

It is not made by or for the assignee, the debtor, or any creditor, but only by wrong doers and for the sole purpose of securing to themselves forever the debtor's property to which, as against his creditors, they have no right whatever.

The principle of equality they resort to was intended for the benefit of creditors, and not at all to shield fraudulent holders of property as against those having a better right to it than they; and it should not be perverted, for their benefit or protection. Within what principle can *they* claim an equal distribution, among creditors, of what they unjustly insist upon keeping from all of them? Having violated all principles of right and equality, will the court listen to *their* appeal for the equality of others, and confirm and secure *all* to them who confessedly have *no right to any of it?*

1. They had no right, *under the pleadings*, and none now, to make this objection.

Their only defence pleaded, relating to the bankruptcy, was that a bankrupt *decree had discharged Eldredge* from his debts (fols. 516–18, 536).

It suggested no other *fact*, and had no further scope or meaning, than would a debtor's plea, of a bankrupt discharge, in bar; *i. e.* only that the *debt* was discharged and barred. This, if true, was no defense for *them.*

(*a.*) The *discharge* was a defense only for Eldredge—a personal privilege — which he alone could set up, or waive as he chose, like the defense of infancy. (*Slocum* vs. *Hooker*, 13 *Barb.*, 536; *Parker* vs. *Baker*, 1 *Clark Ch'y R.*, 136, 8; *Mason* vs. *Dennison* 15, *Wend.*, 64). Bankruptcy and infancy are put upon the *same* ground, as a personal privilege (*Slocum* vs. *Hooker*, *supra*; *Blanchard* vs. *Caswell*, 7 *Gray*, 153, 5). So, the statute of limitations (*Rawles* vs. *The Am. M. L. Ins. Co.*, 27 *N. Y.*, 282, 296; *Hyde* vs. *Van Valkenburg*, 1 *Daly*, 416); usury or any other technical, or statutory defense (*Boughton* vs. *Smith*, 26 *Barb.*, 635; *Murray* vs. *Judson*, 5 *Seld.*, 73, 83–5; *M. T. Co.* vs. *Roseberry*, 2 *L. and Eq. Rep.*, 479; *Britchett* vs. *Mitchell*, 17 *Kans. R.*, 355; *Farr* vs. *Pymer*, 2 *Ch. Sent.*, 20; *Parker* vs. *Rochester*, 4 *Johns. Ch.*, 329, 331–3). So, one is not bound to defend for the benefit of others, either under the statute of frauds (*Cahill* vs. *Bigelow*, 18 *Pick*, 369, 372), or for lapse of time. In *McCartney* vs. *Welch*, 51 *N. Y.*, 626–7, where one might have defended for another's benefit, Leonard, Com'r, said, (Mss.): "He was under an equitable and moral obligation which he might voluntarily perform. The lapse of time was not a subject of defense which he was compulsorily to regard." So, if the judgment be irregular, *he* only can take the objection (5 *Seld.*, 73, 84).

(*b.*) A bankrupt discharge is waived, and here was *waived*, by the debtor not pleading it (*Price* vs. *Peters*, 15 *Abb.*, 197; *Medbury* vs. *Swan*, 46 *N. Y.*, 202; *Rudge* vs. *Rundell*, 1 *T. & Cook*, 649, 651). It is waived by the mere laches of the debtor (46 *N. Y.*, 200; 3 *T. & C.*, 118; *S. C.*, 756; *Barstow* vs. *Hanson*, 2 *Hun*, 334).

But here his confession of these judgments was a conclusive waiver. These *debts* were then as if there had been no discharge. (*Dusenbury* vs. *Hoyt*, 53 *N. Y.*, 521; *Stewart* vs. *Wilson*, 2 *L. & Eq. Rep.*, 234–5). A bankrupt discharge, like the statute of limitations

never *paid* a debt. (*Johnson* vs. *A. & S. R. R. Co.*, 54 *N. Y.*, 416, 426–7).

(*c.*) The *discharge* pleaded is not evidence of the *fact* of discharge, or of its regularity, *except in favor of the bankrupt.* (*Bankrupt Act of* 1867, § 34; *and Waterman* vs. *Robinson*, 5 *Mass.*, 303, 5). It follows, that where *he* does not plead, or prove, but *waives* it, it is as if never granted.

(*d.*) No necessity existed for these creditors to apply to the bankrupt court to annul it under § 34. None but the bankrupt would have had notice. He could as effectually *waive* and set it aside, without the action of the court as with it, and did so; and the position of these creditors is the same as if the court, under that section, had annulled it.

In short, the *recovery* of these judgments *since* the discharge, its *waiver* by the debtor, and it being *no defence for the Moyers*, dispose of the only defence they set up relating to the bankruptcy proceeding. (See Opinions below, fols. 593–5, 611).

2. The idea of an assignment, affecting the creditor's vested right, or of any *devesting* thereof, was not intimated in the answers, or during the trial.

(*a.*) The bankruptcy papers from the petition (fol. 361), to the decree (fol. 545), were *all* offered, *objected to*, and received together as a whole proceeding (fols. 228–9), only under the alleged defence of the debtor's *discharge*. They were pertinent to that issue, but could not, though received without objection, be considered or used upon one not made.

"When evidence is competent upon *the issue* made, its admission without objection does not waive the right to object to its use upon an issue not made by the pleadings."

Bruce vs. Burr, Church. C. J., 14 A. L. J., 358.
Arnold vs. Angell, 62 N. Y., 509.
Williams vs. The M. & F. Ins. Co., 54 N. Y., 577.
Opinion below, fol. 599.

A defence not pleaded is of no avail (2 *Coms.*, 501; 2 *Seld.*, 179); even though proved by the plaintiff. (*Brazil* vs. *Isham*, 2 *Kern.*, 9; *O'Toole* vs. *Garvin*, 3 *T. & Cook*, 121).

(*b.*) Pleading only the discharge, *from all his debts*, and that the debtor "*is therefore discharged therefrom, and from all liability thereon*" (*See Answers*, fols. 516, 518), was only saying that the debt had *no existence* as against Eldridge, and included no suggestion that the plaintiff's right, now claimed by them, *had passed to another.*

The *fact* relied on, and not others, from which it may possibly be presumed or inferred, must be distinctly pleaded, although by statute the presumption arises from those alleged. (*Patterson* vs. *Taylor*, 8 *Barb.*, 250; *Fisher* vs. *Mayor, etc.*, 3 *Hun.*, 649; 3 *Den.*, 314; 6 *Seld.*, 175; 29 *Barb.*, 436, 442; 53 *How.*, 303). Had the plaintiffs' demurred to the alleged defence of the debtor's discharge, could the court have discovered that it contained, by implication, an averment that their right had *passed from them to one not a party*, and on that ground sustained the defence?

(*c.*) The making of the assignment was in no sense "a *judgment* or *determination* of a court;" and although the *decree* might be set up as duly made (*Code*, § 161), this does not dispense with setting up, as required before the code, the assignment or appointment, (where that is *the fact* relied on), and the requisite facts giving the proper officer jurisdiction to make them. (*Seaman* vs. *Stoughton*, 3 *Barb. Ch.*, 344; *Bankrupt act*, §§ 11 *and* 14; *Sto. Eq. Pl.*, § 726, *p.* 562, 1*st ed.*; *Carlton* vs. *Leighton*, 3 *Meriv.*, 667; *Beames Eq. Pl.*, 120–2; *Cooper Eq. Pl.*, 249, 250).

In Seaman *vs.* Stoughton, a creditors' bill against the bankrupt and transferee, who set up the petition and appointment of assignee, and that the right was

vested in him; Held, that *all* the facts giving jurisdiction, to vest the title in him, must be averred.

(*d.*) If they had alleged the *fact* or *objection* now urged, it "might have been overcome by suitable proof," or met by opposing evidence (*Fort Stanwix Bank* vs. *Leggett*, 51 *N. Y.*, 552, 554,5; *Brockway* vs. *Burnap*, 12 *Barb.*, 348; *Fergusson* vs. *Fergusson*, 2 *Coms.*, 361–2; *Opinion*, fols. 603–5); as, that the assignee was discharged under § 28; that all expenses and other debts were paid and the purposes of the assignment accomplished as to all but these plaintiffs and the debtor for, (like that of a receiver) on the assignee's discharge, the property reverts to the debtor, without a re-assignment (*Anderson* vs. *Treadwell*, 1 *Edm.*, 201; *Colie* vs. *Jamison*, 4 *Hun*, 284–6; *Card* vs. *Walbridge*, 18 *Ohio R.*, 413; 12 *Serg. & R.*, 364; *Till*, *Ad. on Eject.* [69], *note* 1; *Opinion*, fol. 603); or, that the plaintiffs had, in some way, been *re-invested* with their original rights; or that the assignee colluded with defendants, or refused or *neglected* to join in or bring suit, or *disclaimed* all right; or, if necessary, the plaintiffs might have *brought in* the assignee, or any creditor (if any, not a party) so that all, however interested, being parties, the fund could be recovered from the fraudulent holder and distributed to those entitled to it (51 *N. Y.*, 554; 32 *Barb.*, 73–5, *and other cases below*).

3. This objection, which concedes plaintiffs' prior right and present interest, is, that after they accrued some other person became technically entitled, *as between him and them*, and as their *trustee*, to *represent* them (and may be others) in prosecuting the fraudulent holders who could have no technical or possible objection if such trustee were joined, either as plaintiff or defendant; and is only an objection for *defect* of parties and *waived* if not raised by answer.

Opinions below, fols. 598, 607, 612.
Code, §§ 144, 147, 148.

Fort Stanwix Bank vs. Leggett, 51 N. Y., 552 554, and 5.
Fox vs. Moyer, 54 N. Y., 125, 130.
Merritt vs. Walsh, 32 id., 685.
Zabriskie vs. Smith, 3 Kern., 322, 336.
Child vs. Brace, 4 Pai., 314.
Depuy vs. Strong, 3 Keyes, 603, 5.

In 51 N. Y., 552, *supra*, a creditors' suit like this, against debtor and fraudulent transferee, this same objection was disposed of on this ground. The court (Reynolds, C.), conceding that the statute *vested* the cause of action in the assignee *alone*, say; "although the assignee was not made a party, that would be an objection, which if not raised by answer, would, under the code be waived."

(*a.*) The absence of a party, whose presence would allow recovery from the fraudulent holder, and distribution to *the plaintiff's* (or to them and others) is clearly within this rule. These plaintiffs "have an interest in" etc., and in the relief sought, and might be *joined* as *proper* parties, plaintiffs (Code, § 117), with the assignee who only represents those beneficially interested, and acts only in their interest. (*Opinions fols.* 601–3, 613; *Bump on B'k'cy, 5th Ed.*, 142; *Allen* vs. *Massey*, 1 *Dill*, 40; 2 *Abb. U. S.*, 60; *Colie* vs. *Jamison*, 4 *Hun*, 284,5,6.

In Sands vs. Codwise (2 Johns., 486, 488–9), a creditor's suit against a bankrupt, his fraudulent transferees, *and his assignee*, where, pending the action, another assignee was appointed; and where *all* the defendants defended and asked a stay until substitution of the new assignee; the court deny the motion and say, "The assignee can be viewed in no other light than a *trustee* for all the creditors. *They* are the persons beneficially interested. He has no personal rights to be affected, for the creditors are the *real* persons, and *their* rights only are in litigation."

In Boone, Assignee, etc., et al. vs. *Hall, et al.* (7 *Bush.*,

Ky. R., 66), where judgment creditors and Boone, the *assignee, joined as plaintiffs* to recover property fraudulently transferred by Hall, the bankrupt, to his co-defendants, the court refer to the fact, that the assignment had been made to the assignee, and then say: "It is apparent to us that the creditors, as beneficiaries, were *proper*, though not necessary parties." And, the court below having, on motion, struck out the *assignee* for misjoinder, and then dismissed the petition of the other plaintiffs because the assignee should maintain the suit for their benefit; it was held, on appeal, that those decisions and the judgment were, in *both respects* erroneous; and they were reversed and the case remanded to proceed as originally commenced.

(*b.*) A class of cases is referred to by Judge Woodruff, "in which defendant may require others to be brought in, so that the judgment * * * may protect him *against their claims:* but this is his own privilege and he may *waive it*" (*McMahon* vs. *Harrison*, 12 *How.*, 39, 40, 45).

So here, had they by their answers availed themselves of this privilege, the plaintiffs could and would have brought in any other necessary or proper party. As, where there is collusion, or the assignee *neglects* or refuses to sue, or to allow the creditors to use his name, any of the creditors have the right to bring suit, "and seek justice for themselves."

Ft. Stanwix Bank vs. Leggett, 51 N. Y., 552, 4.
Sands vs. Codwise, 4 John., 556, 7, 601.
Franklyn vs. Fern, Barnardiston's R., 30, 33.
First N. B'k of Troy vs. Cooper, 9 N. B. Reg. R., 529.
Bate vs. Graham, 1 Kern, 237.
Hagan vs. Walker, 14 How. U. S., 29.
1 Sto. Eq. Jur., § 423; 1 Sto. Eq. Pl., § 495.

(*c.*) The bankrupt assignee may, pending a suit, be brought in (Botts *vs.* Patten 10 *B. Monr.*, 452, *Johnson* vs. *Fitzhugh*, 3 *B. Ch'y R.*, 360; *Lowry* vs. *Morrison*, 11 *Pai.*, 327; *Cleveland* vs. *Boerum* 24 *N. Y.*, 613), or,

be made an original party, or brought in, and put to his election, either to *disclaim* or *adopt* the suit, and take the fruits for distribution (*Freeman* vs. *Deming et al*, 3 *Sandf. Ch.*, 327, 333; *Botts* vs. *Patten, supra*, *Card* vs. *Walbridge*, 18 *Ohio*, 412–3; *Sands* vs. *Codwise*, 2 *Johns.*, 489; *S. C.*, 4 *Johns.*, 556, 572, 589, 601–2).

(*d.*) "Any person may be made a defendant who has or claims an interest in the controversy *adverse to the plaintiff*," etc. (*Code*, § 118). The proper parties being before the court, as plaintiffs or defendants, it will pronounce such judgment as the facts of the case require (*Cole* vs. *Reynolds*, 18 *N. Y.* 77, *Harris, J.*).

(*e.*) The defendant is not allowed to object "that the plaintiff had assigned his claim before suit, where it is not set up." "If the suit was not brought in the name of the real party in interest, the objection was *waived* by its not being set up as a defense (*Savage* vs. *The Corn. Ex. Co.*, 4 *Bosw.*, 2, 15–16; *Smith* vs. *Hall, C't of Appeals, Sept.* 19, 1876, *Rapallo J.* 2 *L. and Eq. R.*, 556).

The plaintiffs had better equity than these appellants, and prior to any right of the assignee — clearly so, as against fraudulent holders (4 *Johns. Ch.*, 687, 9).

(*f.*) To allow this objection here, would secure to the wrongdoers all the benefits of an interpleader, without alleging any transfer to the one not a party, or that *he has made any claim* against them; and without conceding that either, plaintiffs or such other, has any claim against them, or intimating any willingness to disgorge to either (*see cases below*).

II. The referee has *not found* the fact of an assignment, or of any divesting of plaintiffs' right to seek their own remedy. He decided, only as a legal conclusion, that the *discharge was, under the pleadings*, unavailable to the fraudulent holders; and that neither it nor the assignment *connected therewith* furnished any *bar* to the plaintiffs' recovery (fol. 570).

Nor did the appellants request that any such fact be found (fols. 353–7).

III. Nor was any assignment, or passing of the plaintiff's right, *proved* as against them.

1. The bankrupt act (§ 14) permits the certified copy assignment, to be evidence *only for the bankrupt assignee.*

(*a.*) It provides that *he* may sue for * * * the effects, prosecute and defend suits * * * and a certified copy, etc., of the assignment * * * shall be conclusive evidence of *his* title as such, to take, sue for, etc., *as hereinbefore mentioned.* James on bankruptcy (pp. 62–3), says, "That for the purpose of proving the assignee's title in any suit brought *by him* or in any proceeding *in which he claims the right, etc.*, the production of a copy of the assignment duly certified, will be sufficient."

(*b.*) It was only to enable the assignee more easily to prove his right when *he* makes the claim; and was not intended at all to furnish wrongdoers, or others, as between themselves, with any such facilities; and especially so, where *he* makes no claim.

In Cone, Assignee, etc., *vs.* Purcell (*mem.*, 56 *N. Y.*, 649), the court, (Andrews, J., Mss.), referring to this provision, in § 14, and to the action being *by the assignee, as such*, say, "The statute establishes a rule of evidence which dispenses with the necessity of proving the jurisdiction of the court *in this particular case.*"

In Waterman *vs.* Robinson (5 *Mass. R.*, 303–5), where the right of bankrupt assignees was in question; *held*, under a similar provision, that it did not apply to a suit between *other* parties.

(*c.*) As between *these* parties, full common law proof was necessary (*Waterman* vs. *Robinson supra; Wood* vs. *Grundy*, 3 *Har. & J.*, 13; *Barney* vs. *Patterson*, 6 *id.*, 182; *Den* vs. *Wright*, *Pet. C. C. R.*, 64; *Hart* vs. *Strode*, 2 *Marsh.*, 115).

There was then no proof that the right in question was transferred to the assignee.

2. The certified "copy *of a copy* of an assignment" (fols. 418–23) was no proof of the *execution* or contents of the assignment, if any existed.

(*a.*) It did not prove the making of the *original*, but only that it was a copy of a paper in the clerk's office purporting to be a copy, and it was no proof of a copy of the *original* or of its contents, and clearly not of its *execution*. It required collateral proof of its genuineness. (*Bissell* vs. *Pierce*, 28 *N. Y.*, 252; *Sunderlin* vs. *Wyman*, 10 *Hun.*, 493; *George* vs. *Toll*, 39 *How.*, 497; *Nichols* vs. *The Kingdom, etc., Co.*, 56 *N. Y.*, 618).

(*b.*) It was a private paper, *belonging only to the assignee*, and neither it nor a copy was required by any law to be filed there (*see Bankrupt Act* § 14, *George* vs. *Toll*, *supra*), and although found there it was not evidence unless required to be kept there (6 *Cow.*, 751; 3 *Hill*, 42; 6 *Wen.*, 228; 7 *Har. & J.*, 147). 45 N. Y. 19

Private writings in a public office cannot be proved by the certificate (3 *Den.*, 238, 241).

It follows, that the certified *copy of a copy*, read with the other bankruptcy papers (fols. 228–9), although pertinent, under the alleged defence of *discharge*, as connected with that proceeding, did not prove a transfer and cannot be *used* for that purpose (*Williams* vs. *The M. & F. F. Ins. Co.*, 54 N. Y., 577; 62 N. Y., 508, *and cases* Point I sub., 2).

IV. The *assignment* may be attacked and avoided, in the State court for *fraud*, although the *discharge*, when set up by the bankrupt, may not be.

1. The provision, in the bankrupt law, for attacking the *discharge* for fraud applies only, and is *limited to the discharge* (*Bank't act*, § 34, *The O. N. Bank* vs. *Olcott*, 46 *N. Y.*, 15). This act leaves the assignment to the rule prevailing under the act of 1841 for attacking the

discharge and the other proceedings in bankruptcy by replying to them, when set up, that they were fraudulent. No discharge is now valid, if fraudulently obtained; and the only difference, between this act and that of 1841 as to the mode of impeaching any of the proceedings, is confined to the *discharge* (*Bankrupt act*, §§ 29, 34; *James on Bk'cy*, 136; *The O. N. Bank* vs. *Olcott*, *supra*).

2. The present rule, for impeaching the *discharge*, does not apply where the bankrupt *waives* it; for, as to him and these plaintiffs, their rights are as if there were no discharge.

3. The assignment or the appointment of the assignee, then, is left subject to the ordinary rules; and may be *entirely overthrown* by proof that it was part of a fraudulent transaction, which a court of equity would not allow to defeat the creditors who were intended to be defrauded by the proceeding.

4. The *discharge* being waived, is not in question here, but the assignment or appointment is; and they were part of a *scheme* to defraud creditors, and void. The Moyers held, after satisfying their own claims, and saying nothing of interest, at least, eleven or twelve thousand dollars belonging to the debtor (Findings, fols. 553–4, 557–8), in money, for the sole purpose of preventing creditors from reaching it. Before, and when receiving it, and often afterwards, they promised the debtor that they would restore it to him (*Findings*, fols. 548, 562; *Ev.*, 99, 100, 109, 118, 193, 217, 220, 2–3), the later promises being *to restore it all to him when through bankruptcy* (*Findings*, fols. 562–3; *Ev.* 209, 222–3, 224–5, *on slip*). With *this purpose* they assumed the burden and bore the expense of the proceedings in bankruptcy; using that court and its proceedings as a cover of his property in their hands. Such a fraud vitiates even *formal judgments* (*Warner* vs.

Blakeman, 4 *Keyes*, 487, *Woodruff, J.*; *Ind. P. & C. R. Co.* vs. *Tyng*, 4 *T. & Cook R.*, 535; *Story on Contr.*, § 495; *Martin* vs. *Smith*, 1 *Dillon*, 85; 4 *B. Reg. R.*, 83; *Sands* vs. *Codwise*, 4 *Johns*, 558). Then why not this alleged transfer?

V. Although, it is not for the *Moyers* to say there was a *discharge*, and therefore our judgments create only a *new* debt; but assume it; then as the complaint charged (fols. 475–6), and the referee, upon abundant evidence, found (fols. 547–8, 562–3), that the fraudulent transfer was on a promise to restore the property to the debtor, as stated in last point, it was therefore *void* as against even *subsequent* creditors (2 *R. S.*, *m. p.* 135, §1, *Opinion*, *Learned J.*, fols. 597–8). Besides, the transactions in question, between them, being fraudulent *in fact*, as found (fols. 563–4), were void as to, and the proceeds were held in trust as well for, *subsequent*, as existing creditors (*Partridge* vs. *Stokes*, 44 *How.*, 381–3; *Mullin J.*, *Gen. T.*, 4*th Dep't*, *and cases cited*; 7 *Alb.*, *L. J.*, 220; *Savage* vs. *Murphy*, 8 *Bosw.*, 75; *aff'd*, 34 *N. Y.*, 508; *Case* vs. *Phillips*, 39 *id*, 164; *Day* vs. *Coolie*, 118 *Mass. R.*; 13 *Alb.*, *L. J.*, 404–5; *Mead* vs. *Gregg*, 12 *Barb.*, 655–6).

VI. These fraudulent holders have *no right* to claim a technical passing of title to the assignee. If there was; it was not at all for their benefit or protection, but only for certain purposes, and for the benefit of those justly entitled to the property. (*Colie* vs. *Jamison*, 4 *Hun.*, 285–6; *Opinion* fols. 613–4).

If *they* obtained and hold the debtor's property by fraud, they *are* "*not entitled to the benefit of any technical rules* rendering it unnecessarily difficult to commence or maintain an action for the recovery of property which they have so fraudulently obtained." By engaging in a fraudulent scheme, they forfeited all right to protection, either at law or in equity." (*Fras*

chieris vs. *Henriques*, 36 *Barb.*, 280; *Bump Frdt. Conv.*, 572; *Holland* vs. *Cruft.*, 20 *Pick.*, 321; *Wood* vs. *Hunt*, 38 *Barb.*, 302–309; *Bean* vs. *Smith*, 2 *Mason*, 252, 285, 296; *Sands* vs. *Codwise*, 4 *Johns*, 598–9; *Merrick* vs. *Brainard* 38 *Barb.*, 589).

A fraudulent assignee cannot retain what he paid for the assignment (*Holland* vs. *Cruft*, *supra*; *Fullerton* vs. *Vial*, 42 *How.*, 294, Ct. of Appeals).

21 Wall 475. 480
2 Otto 101. 105

In Fox *vs.* Gardner, assignee, ~~in the U. S. Sup. Court (11 Alb. L. J., 380–81),~~ where it was urged that the fraudulent party might be made liable to others; the court (Hunt, J.), say: "Should this be so, it would add another to that large class of cases in which persons endeavoring to defraud others are caught in their own devices. The law looks with no particular favor on this class of sufferers." *

VII. Where, as here, the assignee does not interfere or make claim, no one can claim it *for him;* or make it an excuse for defending an action for his own benefit, and keeping the debtor's property from his creditors.

In F. S. Bank *vs.* Leggett (51 *N. Y.*, 552, 4), a creditors' suit, against the debtor, and his wife, the fraudulent transferee. Both defended, and claimed that only his assignee could maintain the action, but the court say; the assignee, "Graham, is not a party to the suit, and, so far as we know, makes no claim," * "It is enough now, that he is not a party to this suit * and it is not for the fraudulent debtor and his wife, who have no interest whatever in the fund, to undertake to guard any right the assignee may possibly have. If he has any, *he alone* must assert it." And so held; conceding that the statute vested the cause of action in the assignee alone.

In Card *vs.* Walbridge (18 *Ohio*, 411, 413), a like suit, by a *creditor alone*, against a bankrupt and his fraudulent transferees, (assignee not a party) to subject

* In Neblett v. McFarland (2 Otto 101.105) the Court (by Miller J.) say that those who obtain the property of others by fraud

the bankrupt's property, fraudulently transferred, to the payment of the plaintiff's judgment. The bankrupt defended, set up his *discharge*, and that only the assignee could maintain the action, and *disclaimed* all interest in the property; but, it not appearing that the assignee claimed it, *held*, the suit was properly brought by the creditor and relief granted. The court say (*page* 413), "It is claimed by the defense that the suit should have been brought by the assignee. Now, if the complainant claimed under the bankruptcy proceedings, there would be force in this. But he proceeds in derogation of those proceedings. An assignee was appointed." (Under the act of 1841, there in question, title passed by operation of law on such appointment.) The court add: "*It nowhere appears that any effects came into his hands. None of the creditors proved their claims. The assignee sets up no claim to control the matter so far as appears; nor have we any evidence that now or at the filing of this bill there was any assignee acting in the matter*" * "If the assignee could alone bring the suit, the creditor in many instances would be deprived of all remedy." * * "If the assignee could alone bring the suit, and the bill on that account be dismissed, the complainant would be without remedy, the time having long since passed in which the assignee could bring suit" * "We think the creditor might with propriety proceed in his own name" (p. 414).

In Freeman *vs.* Deming (3 *Sandf. Ch'y*, 327, 333), a like suit by *creditors alone* against the bankrupt, his *assignee*, and fraudulent transferee; *held*, that although the fraudulent transferee's title failed, and the right to follow the fund passed to the bankrupt assignee, yet, that the bill could not be dismissed. The court say, "The *only party*, the assignee, who has a right to allege the invalidity of the assignment acquiesces in the plaintiff's prosecution of this suit, claiming to receive its fruits under the bankrupt act. He is at liberty to

take this ground, and it does not affect the rights" of the holders of the property. Also *held*, that it was proper that the assignee "either adopt the suit or abandon his claim;" and it was decreed that the holders of the property account, etc.

2. The rights of bankrupt assignees "are not to be taken into consideration unless they have themselves interfered" (*Drayton* vs. *Dale*, 2 *B. & Cress.*, 293, 295–7; *Fort Stanwix Bank* vs. *Leggett*, *supra*; *Card* vs. *Walbridge*, *supra*; *Freeman* vs. *Denning*, *supra*; *Seaman* vs. *Stoughton*, 3 *Barb. Ch.*, 349; *Eyster* vs. *Gaff*, *Sup. Ct.*, *U. S.*, 13 *Alb. L. J.*, 144–5); even where their rights are claimed either *by* or *against* the bankrupt in a suit to which *he* is not a party (*see same cases*, *also Sanford* vs. *Sanford*, 58 *N. Y.*, 67; *Silke* vs. *Osborne*, 1 *Esp.*, 140; *Evans* vs. *Brown*, *id.*, 170; *Fowler* vs. *Down*, 1 *B. & P.*, 47, 48–9; *Bird* vs. *Pierpont*, 1 *Johns.*, 126). And certainly, the fraudulent holder cannot ask it.

In Smith *vs.*— (4 *Edw. Ch.*, 653), a creditor's bill against *bankrupt alone*, who pleaded fully the bankruptcy proceedings, assignee's appointment, in whom his effects vested (p. 655), and that the plaintiffs' judgment was prior to his petition and provable, and also set up his *discharge*. Held (p. 658), that the plea showed the defendant discharged, but that the bankrupt assignee is *the person to take measures to overreach this creditor's claim and not the debtor*, who can no longer have any interest in the question whether the fund shall go to a particular creditor or be distributed among all the creditors." This applies with far greater force to the fraudulent holder.

In Fowler *vs.* Down, the court adopted the principle, "that if the assignees do not dispute the bankrupts' right to sue, *third persons* shall not" (1 John., 126). "What shall be done, between the bankrupt, and the assignees or creditors, is one thing, and what between him and a stranger, is another."

3. If "the defendant fears a future action by the assignee, he has only to give him *notice* of the first action that he may elect either to pursue or abandon the claim" (*Fowler* vs. *Down*, 1 *B. P.*, 47,48–9; *Drayton* vs. *Dale*, 2 *B. C.*, 293, 5–7; *Kitchen* vs. *Barse*, 7 *Eas.*, 53).

The case, Botts vs. Patten (10 B. *Monr.*, 452,) cited by the appellants below, as holding that a creditor, after a bankrupt's discharge, cannot proceed against his fraudulent transferee, *does not so decide.* The suit was by a creditor against a bankrupt, and his fraudulent transferee, (so far like this case but no farther); *both pleaded the discharge* and that all the debtor's estate had *vested* in his assignee (who, the court having required him to be made a party, *was brought in* and made defendant). They also set up the two years' limitation. *Held*, the court saying (p. 455) that, "As the debtor was a discharged bankrupt, and no longer liable for the judgments, the creditors could not subject any of his estate to the payment of the debts. If he be not liable for the debts, McCorkle (the fraudulent holder) can not be required to pay them out of the estate in his hands, for that can be reached alone to pay Patten's debts. *As therefore, the latter is discharged from the debts, and no longer liable for them, the creditors cannot proceed against his fraudulent transferee to obtain payment from him.*"

The court say expressly, "It is not necessary to decide as to the statute of limitations, or *the right of the assignee* in bankruptcy to this estate in the hands of the fraudulent transferee, *or to determine whether or not the right to it is vested in him;* and that although the bankrupt assignee is a party to the suit he has filed no cross-bill, *nor has he asserted any claim to the property against McCorkle.*"

This case is decidedly in favor of these plaintiffs,

take this ground, and it does not affect the rights" of the holders of the property. Also *held*, that it was proper that the assignee "either adopt the suit or abandon his claim;" and it was decreed that the holders of the property account, etc.

2. The rights of bankrupt assignees "are not to be taken into consideration unless they have themselves interfered" (*Drayton* vs. *Dale*, 2 *B. & Cress.*, 293, 295–7; *Fort Stanwix Bank* vs. *Leggett*, *supra*; *Card* vs. *Walbridge*, *supra*; *Freeman* vs. *Denning*, *supra*; *Seaman* vs. *Stoughton*, 3 *Barb. Ch.*, 349; *Eyster* vs. *Gaff*, *Sup. Ct.*, *U. S.*, 13 *Alb. L. J.*, 144–5); even where their rights are claimed either *by* or *against* the bankrupt in a suit to which *he* is not a party (*see same cases*, *also Sanford* vs. *Sanford*, 58 *N. Y.*, 67; *Silke* vs. *Osborne*, 1 *Esp.*, 140; *Evans* vs. *Brown*, *id.*, 170; *Fowler* vs. *Down*, 1 *B. & P.*, 47, 48–9; *Bird* vs. *Pierpont*, 1 *Johns.*, 126). And certainly, the fraudulent holder cannot ask it.

In Smith *vs.*— (4 *Edw. Ch.*, 653), a creditor's bill against *bankrupt alone*, who pleaded fully the bankruptcy proceedings, assignee's appointment, in whom his effects vested (p. 655), and that the plaintiffs' judgment was prior to his petition and proveable, and also set up his *discharge*. Held (p. 658), that the plea showed the defendant discharged, but that the bankrupt assignee is *the person to take measures to overreach this creditor's claim and not the debtor*, who can no longer have any interest in the question whether the fund shall go to a particular creditor or be distributed among all the creditors." This applies with far greater force to the fraudulent holder.

In Fowler *vs.* Down, the court adopted the principle, "that if the assignees do not dispute the bankrupts' right to sue, *third persons* shall not" (1 John., 126). "What shall be done, between the bankrupt, and the assignees or creditors, is one thing, and what between him and a stranger, is another."

3. If "the defendant fears a future action by the assignee, he has only to give him *notice* of the first action that he may elect either to pursue or abandon the claim" (*Fowler* vs. *Down*, 1 *B. P.*, 47,48–9; *Drayton* vs. *Dale*, 2 *B. C.*, 293, 5–7; *Kitchen* vs. *Barse*, 7 *Eas.*, 53).

The case, Botts vs. Patten (10 B. *Monr.*, 452,) cited by the appellants below, as holding that a creditor, after a bankrupt's discharge, cannot proceed against his fraudulent transferee, *does not so decide.* The suit was by a creditor against a bankrupt, and his fraudulent transferee, (so far like this case but no farther); *both pleaded the discharge* and that all the debtor's estate had *vested* in his assignee (who, the court having required him to be made a party, *was brought in* and made defendant). They also set up the two years' limitation. *Held*, the court saying (p. 455) that, "As the debtor was a discharged bankrupt, and no longer liable for the judgments, the creditors could not subject any of his estate to the payment of the debts. If he be not liable for the debts, McCorkle (the fraudulent holder) can not be required to pay them out of the estate in his hands, for that can be reached alone to pay Patten's debts. *As therefore, the latter is discharged from the debts, and no longer liable for them, the creditors cannot proceed against his fraudulent transferee to obtain payment from him.*"

The court say expressly, "It is not necessary to decide as to the statute of limitations, or *the right of the assignee* in bankruptcy to this estate in the hands of the fraudulent transferee, *or to determine whether or not the right to it is vested in him;* and that although the bankrupt assignee is a party to the suit he has filed no cross-bill, *nor has he asserted any claim to the property against McCorkle.*"

This case is decidedly in favor of these plaintiffs,

holding: (1.) That as the discharge was *pleaded by the debtor*, the debt was discharged, and there was *no debt* upon which to pursue the fraudulent holder. (2). That the assignee, here, could have been brought in and made a party to this suit, as there, and therefore the present objection, now made by the Moyers, is only one for a *defect* of parties; and, (3.) The court refer significantly to the fact that the assignee, though a party, had not asserted any claim to the property. It is apparent, from the whole case, that the same court in a case like this, would have granted the relief.

Nor does either of the other cases, cited below against us, so decide, or apply to the situation of this case.

In Jones *vs.* Millbank, 6 Lans. 73, *held* only, that the *assignee* might recover property fraudulently transferred by the bankrupt.

In 5 Abb. N. S., 64, the bankrupt, to relieve himself from arrest on a claim barred, set up his bankruprcy proceedings, the appointment of, and the *assignment* to the assignee. Section 21 of the Bankrupt Act applied to the case. In id., 68, the question here, was not raised, decided or considered.

In re Myers, 1 *Bkt. Reg. R.*, 162 (*S. C. Ben. Dist. Ct R.*, 424), was an application to vacate a *stay* until the determination of the question of discharge. And, because the creditors filing the bill, had *proved* their claims, the court (under § 21 of the Bankrupt Act), continued the stay. Nothing else was decided.

9 Penn., 355. The plaintiff levied on an insolvent's property after his assignment and discharge, which *he* set up successfully; as often done in our own state.

10 Allen, 468. After an insolvent's *assignee had*

demanded property of the plaintiff, to whom the insolvent had sold and delivered it to secure liabilities, the defendant took it from the plaintiff and sold it on execution: *Held*, not a defence that the sale to plaintiff was fraudulent. The plaintiff recovered. (This, within every feature, is a case for respondents.)

103 Mass., 184. *Held* only, that after adjudication of bankruptcy, the bankrupt's property could not be attached on *mesne* process, (§ 21 of Bankrupt Act, applied, and no such question as here arose).

In The O. N. B'k etc. *vs.* Olcott, 46 N. Y., 12, and in 57 Me. 69; and 108 Mass., 502, the discharge had not been waived or annulled, and the bankrupt defended, and set up his discharge: *Held*, as in Botts *vs.* Patten, *supra*, that the plaintiffs' judgments were extinguished and there was therefore no debt as against the bankrupt: also that the *discharge* so pleaded by the bankrupt, could not be attacked in the state court for fraud.

In 50 N. Y., 593, the contest was between the creditor and the bankrupt alone. It does not apply to any question here.

In all above cases the bankrupt set up his discharge, which extinguished the debt, and the objection came from him; not as here, from the fraudulent holder only.

VIII. The plaintiffs having the right, as creditors, to pursue the Moyers before the bankruptcy proceedings, the latter can not set up an outstanding title in another, *without connecting themselves with it.* (*Smith* vs. *Hall, N. Y., C't of App's, Sept.* 19, 1876, 2 *L. and Eq., Rep.*, 556, *Rapallo J.; and see* 62 *N. Y.*, 329; 16 *Wend.*, 563, 571); nor have the benefit of a bill of interpleader, or of the provision of the code (§ 122) without taking the burdens imposed. It is not pretended that any other makes any *claim* upon them. They are *wrongdoers* as to both, plaintiffs and assignee, and do not admit the right of either, but claim the property them-

selves; nor are they willing to deliver to either (*Bell* vs. *Hunt*, 3 *Barb. Ch.*, 391; 3 *Jones & S.*, 373; 53 *N. Y.*, 536).

In Rogers *vs.* Weir (34 N. Y., 467–8), the court say, in effect, "If the defendants refuse these plaintiffs the property, they may also refuse the assignee, and retain it for an indefinite time.

They cannot volunteer to protect the claims of third persons, with whom they have had no dealings, to defeat their own liability. "The pretended claimant (the assignee) has shown no wish to enforce his claim, if any he has" (*Lund* vs. *The S. S. B'k*, 23 *How.*, 258, 260; *S. C.*, 20 *How.*, 461).

IX. These creditors would be forever deprived of all remedy for their demands by a refusal of the relief sought (*Card* vs. *Walbridge*, 18 *Ohio*, 413–4: *see abstract above, in Point VII; Bankrupt Act*, § 2: *Baily* vs. *Weir*, *in U. S. Sup. Ct.*: 11 *Alb., L. J.*, 219, *fully reported, p.* 297); as it is now impossible for the assignee to bring suit, or obtain any relief for their benefit. A refusal of the relief would confirm and perpetuate the fraud.

X. Assuming all that is claimed for the proceedings in bankruptcy (though not pleaded or proved), these creditors *had the right*, when this suit was brought, in May, 1872, to proceed in their own names.

No claim was proved, nor any assets disclosed. Neither the assignee, nor the bankrupt, or any creditor has ever claimed this property, or objected to the plaintiffs having such relief. Indeed, they are the *only* creditors; and the fund in the fraudulent holders' hands exceeds, by at least $8,000, a sum sufficient to satisfy their demands.

1. No creditors are entitled to share in the effects, but those who *prove* their claims as prescribed (*Hill'd on Bankruptcy*, 194 *and note*, *Bump. Bankruptcy*, 200, 231; 18 *Ohio St.*, 413); or to have the benefit of the

assignee's bond (*Bankrupt Act*, § 13; *Bump. Bankruptcy*, 112; *James, Id.*, 31); or have notice of any dividend, or share in the estate (§§ 27 and 28, *Bump.* 195, *James* 78, 120), or to notice of application for discharge, etc. (§ 29), or to choose an assignee (§ 13), or a committee to wind up (§ 43).

It is not to be presumed there are any creditors except those *proved* (2 *Johns. Ch.*, 283, 296–7; 9 *Cow.*, 722, 1 *Pai.*, 637).

The schedule of indebtedness is not proof that one named there is, for any purpose, a creditor, (*Bump Bankruptcy*, 200. *Tyler* vs. *Brock*, 4 *N. Y., Week., Dig., N. Y. C't of Appeals, Rapallo J.*)

There being no assets, and against one's interest to expend time and money in proving his claim, it will not be presumed he did so (*Burrill, Cir. Ev.*, 166; *Ph. Ev. C. H. & E.'s Notes*, 504 [608]; 8 *B. & C.*, 448).

2. "When all the claims *proved* are paid in full, it is the same as if all the creditors were paid in full, and the balance remaining *belongs to the bankrupt*" (*Bump Bankruptcy*, 200; 4 *Hun.*, 285–6; 2 *Abb. U. S.*, 67; 12 *Serg. & R.*, 364; *Till. Adams. on Eject.* [69], *note* 1).

The property that might be reached by the assignee *belongs to the plaintiff's debtor*, and through him to his creditors. It may be, that the assignee might have recovered the entire fund, ten or $12,000, and restored it to the debtor; but, however that may be, the plaintiffs may recover their claims from those who hold it *in trust*, either, directly for the creditors, or for the assignee, or for their debtor — and it matters not which — as, in either view, the plaintiffs are entitled to it, and *neither party here, has been met with any objection from the assignee or any creditor, that it must pass through the assignee's hands.*

3. If there be another creditor, he could not *now* collect his claim out of this property except by suit in his *own name*; for it is too late for a suit by the assignee. (See Point IX.)

4. It will be presumed that within two years after the adjudication (Dec. 11, 1867), the assignee's accounts were passed, and he duly discharged as such; clearly so now, after a lapse of nine years (*Bankruptcy act*, §§ 27, 28; *James on Bankruptcy*, 121; *Ross* vs. *McJunkin*, 12 *Serg. & R.*, 364).

If the right once existed in the assignee, it long since *reverted* to the creditors themselves. "We have *no evidence that now or at the filing of this bill there was any assignee acting in the matter*" (18 Ohio, 413).

The fraud was not exposed until June, 1870, (findings, fol. 564, evidence fols. 124–6, 133–4), nearly three years, and this suit was commenced in May, 1872, (fol. 455), nearly five years after adjudication of bankruptcy (fol. 410).

XI. This being an equity action, the judgment will not be reversed for errors, if any, in receiving testimony, as all the facts found are fully sustained by unobjectionable evidence; and it appears by the whole case that substantial justice has been done.

Church vs. Kidd, 5 T. & Cook, 455, 62.
Woodruff vs. McGrath, 32 N. Y., 255.
Newlin vs. Lyon, 49 id., 661.
Patterson vs. Copeland, 4 N. Y. W. Dig., 167.

But the referee committed no error in receiving testimony.

1. It was proper to show the debtor arranged to vest the title to his farm in his brother Seth, or his wife, without consideration, to avoid paying the insurance note then in suit, but made a new arrangement (fol. 200), i. e., to vest the Moyers with the title by foreclosure. And especially so, where the combination between him and the Moyers, to do so, to save it from

the creditors, had been clearly established (fols. 94–100, 102–4, 186–194). (*Savage* vs. *Murphy*, 8 *Bosw.*, 74; aff'd 34 N. Y., 508.)

2. The objection to the declarations of the defendants Moyer and Eldredge, testified to by Parsons (fols. 185–94), were properly overruled (fols. 224–5).

(*a.*) It having appeared that the debtor and the Moyers, had combined together to defraud creditors, the acts or declarations of either, in aid of the common purpose, were competent against any of them (*Cuyler* vs. *McCartney*, 40 *N. Y.*, 222, 228; *see cases cited in brief, p.* 226; *Newland* vs. *Lyon*, 49 *id.*, 661; 1 *Ph. Ev. Cow. H. and Edw., notes*, 205, *note* 83). "The conduct, acts, and declarations of the separate parties in the planning or execution of the scheme may be shown as evidence of the common design" (*id., and cases cited, Moers* vs. *Martens*, 8 *Abb. Pr.*, 257, *Davies J.*; 3 *Greenl. Ev.*, §§ 93, 94, 29 *Pa.*, 479).

(*b.*) They were part of the *res gestae* (*Newland* vs. *Lyon, supra*; *Howe* vs. *Brundage*, 1 *T. & Cook*, 429–30).

3, It was proper on cross-examination of Henry Moyer to inquire into collateral facts to discredit him. (fol. 274). It was in the discretion of the court. The witness could and *did claim his privilege* and declined to answer. Besides, it was not the subject of an exception (*Allen* vs. *Bodine*, 6 *Barb.*, 383; 32 *N. Y.*, 127, 135, 139; 4 *Den.*, 502, 6).

4. The objection to the testimony of S. F. Fonda (fols. 327–9) was properly overruled. He only testified to Elihu's request to him, and that he repeated the same to Moyer and Moyer's answer thereto.

XII. The pleadings admitted the amount received by the Moyers, on the sale of the Leesville farm in parcels, and the date of the receipts, amounting to $7,200 (*Complaint*, fols. 480–1, *Answers*, fols. 506–7, 530); also that the debtor, Eldredge, worked the Leesville